47-39

M.R.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~584~~. 37 US

THE UNITED STATES, APPELLANTS,

vs.

ALEXANDER COLLIE.

20 S.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 12, 1874.

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SUPREME COURT OF THE UNITED STATES.

No. 584.

THE UNITED STATES, APPELLANTS,

vs.

ALEXANDER COLLIE.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims of the United States.

ALEXANDER COLLIE, *vs.* THE UNITED STATES. } 2726. Filed June 11, 1867.

To the honorable the judges of the Court of Claims:

Your petitioner, Alexander Collie, an alien and a subject of the Queen of Great Britain and Ireland, and resident of London, England, respectfully shows unto your honors:

That at the time of the capture of the city of Savannah, by the forces of the United States, under the command of Maj. Gen. William T. Sherman, and in the month of December, in the year one thousand eight hundred and sixty-four, he was then and there possessed in his own right of four thousand nine hundred and thirty-six bales of cot-
2 ton, which were then and there his own property, and which were then and there duly stored, marked, and numbered; that all of the said bales of cotton were captured and taken possession of by the said forces under the command aforesaid, and were soon thereafter delivered to and received by one Simeon Draper, a duly-authorized agent of the Treasury Department of the United States, by whom the same were forwarded, against the will and without the consent of your petitioner, to the city of New York, and were there by him sold, and the proceeds thereof paid into the Treasury of the United States; that your petitioner is not accurately advised as to the actual amount of the proceeds of such sale, so paid into the Treasury as aforesaid, but on information and belief he alleges the same to have been not less than nine hundred thousand dollars in gold.

Your petitioner claims the amount of the proceeds of the said cotton, less the lawful expenses attending the sale, transportation, and disposition thereof.

And your petitioner further shows that he is the owner of the said bales of cotton, and is justly entitled to the proceeds thereof under and pursuant to the provisions of the act of Congress of the United States, approved March 12, 1863, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," (12 U. S. Stat. at Large, 820;) that he has at all times borne true allegiance to the Government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said Government.

CLARENCE A. SEWARD,
Attorney for Claimant, 29 Nassau Street, New York, P. O. Box 217.

Post-office address of the claimant, London, England.

3 UNITED STATES OF AMERICA, *Southern District of New York, ss:*

William E. A. Mackintosh, being duly sworn, says that he is the agent for the claimant above named; that no assignment or transfer of said claim or any part thereof, or any interest therein, has been made; that the said claimant is justly entitled to the amount in said petition claimed from the United States, after deducting all just credits and offsets; and that he believes the facts as stated in said petion are true.

WILLIAM E. A. MACKINTOSH.

Sworn to before me this 10th day of June, 1867.

[L. S.] JOSEPH GUTMAN, JR.,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

[Internal-rev. stamp, 5c. Cancelled.]

4 In the United States Court of Claims, December term, A. D. 1866.

ALEXANDER COLLIE
vs.
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And the said defendants, by their solicitor, E. P. Norton, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of nine hundred thousand dollars, $900,000 (in gold,) the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation, and call for proof thereof.

And for a further plea to the said petition the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because, they say, that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided.

E. P. NORTON,
Solicitor for the United States.

Filed Sept. 9, 1867.

5 In the United States Court of Claims, December term, A. D. 1868.

ALEXANDER COLLIE
vs.
THE UNITED STATES. } No. 2726.

And for a further plea to the said petition the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because, they say, that the said claimant did not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because, they say, that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made

and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

Filed July 17, 1869.

6 In the Court of Claims.

ALEXANDER COLLIE
vs.
THE UNITED STATES. } No. 2726.

At a Court of Claims held at the Capitol, in the city of Washington, the fifteenth day of May, A. D. 1874, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Alexander Collie, claimant, do have and recover of and from the United States the net proceeds 1,757 bales of sea-island cotton, at $231.79 per bale, and of 3,096 bales of upland cotton, at $175.33, making in the aggregate the sum of nine hundred and fifty thousand and seventy-six dollars and seventy-one cents, ($950,076.71.)

By the court.

7 In the Court of Claims of the United States, December term, 1873.

ALEXANDER COLLIE
vs.
THE UNITED STATES. } No. 2726.

From the judgment rendered in the above-entitled cause, on May 15, 1874, in favor of claimant, the defendants, by their Attorney-General, on the 30th day of June, 1874, make application for and give notice of an appeal to the Supreme Court of the United States, the amount in controversy in said cause exceeding the sum of three thousand dollars, to wit, nine hundred and fifty thousand seventy-six dollars and seventy-one cents.

JOHN GOFORTH,
Assistant Attorney-Gen'l.

Filed June 30, 1874.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

8 United States Court of Claims.

ALEXANDER COLLIE
vs.
THE UNITED STATES.

The petitioner claims the net proceeds of 4,936 bales of cotton, and the court finds the facts to be—

That the petitioner is a subject of the kingdom of Great Britain, and

was resident in England during all the time of the transactions hereinafter stated.

That from some time in 1862 till December, 1864, the petitioner purchased in the Confederate States large amounts of cotton, through the agency of Theodore Andrae, acting under orders given to him in 1862, in England, by the petitioner to purchase cotton, and draw on the petitioner for funds that might be required to complete said purchases.

That in December, 1864, at the capture of Savannah, the petitioner owned and was possessed of 1,757 bales of sea-island cotton and 3,096 bales of upland cotton, stored in the city of Savannah, to be ready for shipment to New York or England at the termination of the war; and all of said cotton was seized and taken from the possession of the petitioner by the United States, who sold the same; and its net proceeds, amounting to the sum of $952,076.71, were paid into the Treasury.

That during the late rebellion the petitioner was engaged in running the blockade of the southern ports, by the importation and exportation of merchandise which was not "material of war."

And on the facts stated the court finds that the petitioner is entitled to recover of the United States the net proceeds of said cotton, amounting to the sum of $950,076.71.

And the court finds, as a conclusion of law, that the petitioner, being before, and during, and since the rebellion a subject of Great Britain, and resident therein, is not barred of this action by having imported during said rebellion goods not munitions of war into ports of the confederacy declared by the President's proclamation to be in a state of blockade, as set forth in proclamation of 19th of April, 1861.

LORING, J., delivered the opinion of the court:

The statement of facts finds that the claimant, a subject of and resident in Great Britain, during the rebellion imported goods not munitions of war into the ports of the confederacy. But this was not in him any offense against any law to which he was subject. He was a citizen of a neutral nation, and the law which made the rule and the rights between him and the United States was the law of nations; and under the law of nations, as contended by the claimant's counsel and shown by the authorities he cited, a belligerent cannot prohibit neutrals from trading with its enemy. It can only prevent it, and the difference is very wide, for it involves the right of neutrals to trade with either belligerent, and that right is as clear and certain as it is important to the world's commerce, and a belligerent can only prevent neutrals from trading with its enemy by a blockade efficient for prevention. That is the absolute condition annexed by the law of nations to the use of a blockade, and
9 by its careful discrimination between a paper blackade, which it disclaims and denies, and an actual blockade, which it alone permits, the law of nations says to the belligerent you may keep the neutral vessel out if you can, and it says to the neutral vessel you may get in without force if you can. It thus gives to each a clear and definite right, and this petitioner, in importing his goods into the port of the confederates, was as much in the exercise of his right under the law of nations as the United States were in the exercise of their right in attempting to prevent it; and the fact that the petitioner succeeded in the importation of his goods is evidence that under the law of nations he had a right to do so, because it is evidence of the fact that the United States had not performed the condition on which only, under the law of nations, they

had a right to a blockade at all, i. e., by establishing a blockade efficient for prevention. The proposition of Lord Stowell as to the required completeness of a blockade is of universal admission, and he said as follows: "The very nature of a complete blockade includes that the besieging force can apply its power to every point of the blockaded state. If it cannot, then there is no blockade of that part where its power cannot be brought to bear." (1 Rob., 80; 4 Rob., 66; 1 Acton, 64.)

It is true that a neutral vessel, in attempting to enter a blockaded port, is liable to seizure, but that seizure is not made under the municipal laws of the blockading power, nor for any offense against them, but by its right as a belligerent and under the law of nations, which authorizes it to treat not as a criminal, but as an enemy, those who come to the aid of its enemy.

We are, therefore, not dealing here with a criminal or an offender against our laws or any laws, but with one who has exercised his right as a neutral by importing merchandise not munitions of war into ports of the confederacy, when and where he had the right of entry under the law of nations.

And those laws are a part of the laws of the land, and they involve its highest policy, that of maintaining its good faith and good repute among the nations; and the maintenance of these is the highest duty that can be committed to a judicial tribunal. And that duty belongs to legislatures as well, and therefore a municipal law punishing, directly or indirectly, treasonable offenses as such must, by construction, be confined in its application to our own citizens or aliens resident here, who thereby owe allegiance here.

Nor can there be imputed to the claimant any intent of violating our municipal laws, nor anything more than the fact of aiding the rebellion without that intent, for his intent in importing goods not munitions of war was his own gain in a trade lawful to him by the law of nations, and which trade is so made lawful to him because its intent is the profits of trade, and not the assistance of one of two belligerents.

And the petitioner did not seek to avoid duties or the payment of any legal burdens on his traffic, and it cannot be assumed that he failed to comply with the existing requirements of the ports into which he entered, and if the authorities there were other than those of the United States it was not his fault.

Neither is the petitioner at our bar by any grace, sufferance, or comity, but by his right, secured to him by our statute of July 28, 1866, in exchange for the right his sovereign gives to our citizens to sue him in his courts. And this right has been assured to him by our decisions, affirmed by the Supreme Court, under which our Government is held to be a trustee for aliens as well as for our own citizens.

It may be true that our Government did not, in matters between them and the citizens of the confederacy, admit them in all respects to be belligerents. But it certainly is true that foreign nations, and England among them, both for their governments and citizens, recognized the confederates as belligerents and established their relations with them accordingly; and if our Government objected to this diplomatically, it never practically enforced its objection; and it was, so far as Great Britain was concerned, definitively abandoned in final settlement by the treaty of Washington. And that during the rebellion the confederates were belligerents cannot now be brought into question with the English government or an English subject.

Thus much for the status of the petitioner at our bar.

The facts in this case sever the crime of aiding the rebellion from the act of aiding it. They are entirely distinct things, and, as this case shows, have no necessary co-existence, and their difference and distinctness are recognized under all law and in all courts, civil and criminal. The law of nations recognizes the difference in holding that, where the citizen of a neutral nation gives aid and comfort to one of two belligerents, the other may treat him as its enemy under the laws of war, and not as a criminal under its municipal law. So all criminal courts distinguish between the act and the crime, which is only the moral and legal quality of the act, for in criminal courts pardon purges the crime, and absolves the criminal from its penal consequences; but it does not alter the act, for a thing done is unalterable, and no law or court feigns imperception of that, or rests its action on the fiction of an impossibility. So all civil courts, in their administration of the law, distinguish between the act and the crime, for, if a man forges my name to a promissory note, and is pardoned for it, his crime is purged, and, as it is metaphorically said, thereafter no court can see it. But the court can and will thereafter see the act; for, if the man sues me on the note, I may plead and prove the forgery, and certainly the replication of a pardon would be demurrable and bad in law.

And the language of all text-books and decisions distinguishes between the act and the crime, for they habitually, and in the common accuracy of expression, confine the absolving power of a pardon to the crime and its penal consequences. Thus Justice Blackstone (4 Blk. Com., 402) says: "Pardon makes the offender a new man, and acquits him of all corporal penalties attached to that offense for which he obtained pardon." And offense, when used in reference to pardon, necessarily means crime. So Bacon's Abridgment (v. 7, p. 416) says: "Pardon removes not only punishment, but all the legal disabilities of crime." And the language of decisions is as precise. In 7 Peters, 150, Chief-Justice Marshall defined a pardon thus: "A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual from the punishment the law inflicts for a crime he has committed."

It would seem to be necessarily certain that the Supreme Court, in its decisions that the words in the act of 12 March, 1863, "never given aid and comfort to the rebellion," referred to the crime, did not, and could not, overlook a difference so manifestly existing in fact, and so clearly stated in elementary treatises and authorities, and so certain to occur in practice; and the cases they have decided show that they did not.

Thus in the case ex parte Garland, the Supreme Court said: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offense." And again they said, in the same case: "The effect of this pardon is to
11 relieve the petitioner from all penalties and disabilities attached to the offense of treason committed by participation in the rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind." It would be certainly difficult to select language which would more clearly distinguish between the crime pardon will legally purge and the act that is unalterable. The industry of the learned counsel for the defendants has found the only case in which the language of the court has not distinguished between the act and the

crime; and in that case they co-existed, and there was no need of distinguishing between them. In Carlisle and Henderson, (16 Wall., 147,) the court said in one sentence thus: "The pardon and amnesty do not and cannot alter the fact that aid and comfort were given by the claimants, but they forever close the eyes of the court to the perception of that fact as an element in its judgment." But all the language of the Supreme Court in that case must be construed together. And in a subsequent part of the case, on the same page, the court refers to the effects of pardon, as to which its members agree, and to those as to which they differ, and the statement is as follows: "There has been some difference of opinion among the members of the court as to cases covered by the pardon of the President, but there has been none as to the effect of and operation of a pardon in cases where it applies. All have agreed that the pardon not only releases the offender from the punishment prescribed for the offense, but that it obliterates, in legal contemplation, the offense itself."

Now, in the sentence first cited from this case of Carlisle and Henderson, the Supreme Court says, "The pardon and amnesty do not alter the actual fact," and in the sentence secondly cited they say that the court all agree that pardon "obliterates the offense;" and we think that in this case cited, and all the like cases decided by the Supreme Court, their language shows that they distinguished between the act and the crime, and held that the third section of the statute referred to the crime and that only; for in every case in which the Supreme Court has decided that a claimant, because of his pardon, was entitled to recover, the fact that he aided the rebellion was clear and unaltered, and yet by the decision formed no impediment to his recovery.

And in Pargoud's case, where pardon had obliterated the crime and the unalterable fact was all that remained, we held it was efficient per se to prevent a recovery, and the Supreme Court reversed our decision.

By the decision of the Supreme Court, pardon obliterates the crime and proves its non-existence, and thus supports the allegation a claimant is obliged to make in his petition and prove on trial, viz, that he "never gave aid and comfort to the rebellion;" and that is all the pardon does. But pardon is only one way of proving the non-existence of crime, and another equally legal and efficient way is to prove by circumstances that the claimant could not have committed the crime; and that is done here, for it is shown that this claimant, at the time of his importations, and since, was a subject of Great Britain and resident therein, and owed allegiance there, so that his act was not by our law treasonable, and under the law of nations was not criminal.

The argument for the defendants is, that the third section of the act of March 12, 1863, conditions a recovery under it on proof that a claimant never gave aid and comfort to the rebellion; that it is proved the claimant gave such aid and comfort, and that he had not been released of its consequences by any Executive pardon. As allegations of fact this is all true, but we think the defect of the propositions as an argument is that, as such, it rests on the literal meaning of the words "never
12 given aid and comfort to the rebellion," instead of on their legal meaning and the legislative intent in their use, as these are conclusively fixed for us by the decisions of the Supreme Court, by which the words cited are referred to the crime and not to the act of aiding the rebellion.

And the application of the argument of the defendants that we are called upon by them to make, is, to refer the word of the statute, as to aid and comfort to the rebellion, in the cases of our own citizens and

aliens resident here and owing allegiance here, exclusively to the crime and not at all to the act; and in the case of aliens not resident here and not owing allegiance here, exclusively to the act and not at all to the crime. And certainly that is the only way of bringing this action within the bar set up for the defendants. But we think the rules of construction require us to construe the words of the statute in the same way as to all persons.

As suggested at the bar, the original theory of this court was that the jurisdiction of the crime of aiding the rebellion was given to other courts of the United States of criminal jurisdiction, and under other statutes than that of 12 March, 1863, and that this court of civil jurisdiction had nothing to do under that act but to find a fact on which was conditioned the return of property, vested in the United States by capture jure belli, to its original owners. But this theory has been reversed in all its parts by the Supreme Court, which has decided that the act of 12 March, 1863, requires us to find the crime of aiding the rebellion. And we think this confines the application of the statute to those owing allegiance here. And whether in the decisions of the Supreme Court the crime of aiding the rebellion has or has not been considered apart from the act, they must be considered apart here, for the facts so present them. And it being now the settled doctrine that the statute contemplated the crime and barred recovery as a punishment for that, we think the reasonable inference is that Congress did not intend to punish for treason a foreign subject because he had used his right as a neutral under the law of nations.

NOTT, J., dissenting:

I agree fully as to the general principles ably and elaborately discussed in the opinion of the court, and differ only as to its conclusion. The case before us, I think, is governed by the following propositions:

I. The amended Court of Claims act (12 Stat. at L., p. 765, § 12) provides, "That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant and the original and every prior owner thereof, where the claim has been assigned, has at all times borne true allegiance to the Government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, which allegations may be traversed by the Government, and if, on the trial, such issues shall be decided against the claimant, his petition shall be dismissed."

II. The Supreme Court has decided that the abandoned and captured property cases are "subjects of jurisdiction" to be determined according to the provisions of this general act. (Zellner's Case, 7 C. Cls. R., p. 137.)

III. The general amnesty proclamation, December 25th, 1868, (15 Stat. at L., p. 711,) while it relieves a citizen from making proof of his compliance with the provisions of the statute, (Mrs. Armstrong's Case, 7 C. Cls. R., p. 280,) and even from pleading his innocence according to its requirements, (Pargoud's Case, Id., p. 289,) and extends to a resident
13 alien who owes only a temporary allegiance, (Carlisle & Henderson's Case, 8 C. Cls. R., p. 153,) cannot be extended to the case of a non-resident alien who owes no allegiance and can be guilty of no offense. The conclusion reached by the majority of the court that blockade-running was not an offense against the laws of the United States seems to me

a conclusive reason that the pardoning power cannot help the suitor; for the power of the President to pardon is limited to "offenses against the United States," and "offense" in law is nearly synonymous with "crime," and comprises only those acts to which the law affixes a penalty or punishment. The President may remit a fine or a penalty, but he has no power to remit the forfeiture of a bail-bond. (4 Peters' R., p. 144.) With the obliteration of "offenses" known to the law, having attached to them the tribute of punishment, the pardoning power ends. The statute which has been quoted recognizes the difference between those who owe and those who do not owe "allegiance" to the Government. As to the former class, who have violated that allegiance, the Constitution enables the President to restore them to the condition of legal innocence. As to the latter class, who, being beyond the pains and penalties of the law, are also beyond the pardoning power of the Executive, the Constitution does not authorize the President to re-open for them the courts of the United States which have been closed by express legislative enactment.

IV. The courts of the United States being closed to the claimant, his redress, if he be entitled to any, for "acts committed" against his property during the rebellion by the Government of the United States, should have been sought under Article XII of the treaty of Washington. The purpose of the abandoned or captured property act, (12 Stat. at L., p. 820,) as construed by the Supreme Court, was to create a trust for those citizens who faithfully adhered to the Government during the rebellion, and for those who, not adhering, should afterward be restored to their rights by the executive clemency. It could not have been the purpose of the statute to create a trust for the benefit of a foreigner then carrying on an illicit traffic with the armed enemies of the United States in violation of their blockade and against their declared public policy, nor to allow him to come into a court of the United States as a matter of right and enforce the trust the moment the rebellion ended.

V. Apart from the statutes and apart from the aid and comfort given to the rebellion by blockade-rnnning, it is a controlling principle that the courts of a country will not aid a foreigner to accomplish that which the laws of the country forbid to its own citizens. The title to this cotton was acquired by a non-resident alien during the rebellion, in a blockaded port. The business was conducted through the instrumentality of blockade-runners and against the public policy of the United States. The claimant occupies the position of a smuggler. If he had acquired the fruit of his traffic, the courts of the United States would not disturb him in his possession. Conversely, if the forbidden traffic failed to reach a result, he cannot ask the courts of the United States to aid him in acquiring this property against the declared policy of the United States.

14 In the Court of Claims.

ALEXANDER COLLIE *vs.* THE UNITED STATES. } No. 2726.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General, for the defendants, for the allowance of an appeal, as filed in the clerk's office, June 30, 1874; and of the order of the chief-justice of said court allowing the same; of the findings

of fact by the court, and the conclusion of law thereon, on which the court founded its judgment; of the opinion of the court, and of the dissenting opinion of Judge Nott.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, the seventh day of September, A. D. 1874.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Court of Claims. No. 584. United States, appellant, vs. Alexander Collie. Filed 12th October, 1874.

U. S. Supreme Court.

THE UNITED STATES,

Appellants,

vs.

ALEXANDER COLLIE.

STATEMENT AND POINTS

ON BEHALF OF THE RESPONDENT.

W. W. MACFARLAND,

Of Counsel.

DENVER & PECK,

Solicitors.

NEW YORK:

EVENING POST STEAM PRESSES.

1876.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

THE UNITED STATES,
Appellants,

vs.

ALEXANDER COLLIE,

Statement and Points on behalf of the Respondent.

STATEMENT.

This is an appeal from a judgment of the Court of Claims rendered in favor of Alexander Collie on the 15th day of May, 1874. Collie in the meantime having become bankrupt, his assignee in bankruptcy has by stipulation been substituted as defendant in error. The action was brought to recover the proceeds of 4,936 bales of cotton, the property of the claimant Collie, seized by the agents of the government at Savannah, Ga., in Jan., 1865, sold, and the proceeds paid into the treasury.

The facts found by the Court of Claims are the following:

"That the petitioner is a subject of the Kingdom of Great Britain, and was resident in England during all the time of the transactions hereinafter stated; that from sometime in 1862, till December, 1864, the petitioner purchased, in the Confederate States, large amounts of cotton through the agency of Theodore Andrae, acting under orders given to him in England in 1862, by the petitioner, to purchase cotton and draw on the petitioner for funds that might be required to complete said purchases; that in December, 1864, the petitioner owned and was possessed of 1,757 bales of Sea Island cotton, and 3,096 bales of upland cotton, stored in the city of Savannah, to be ready for shipment to New York or England at the close of the war; that all of said cotton was seized and taken from the possession of the petitioner by the United States, who sold the same, and its net proceeds, amounting to the sum of $952,076.71, were paid into the treasury; that during the late rebellion the petitioner was engaged in running the blockade of the Southern ports by the importation and exportation of merchandise which was not material of war."

In this connection, while it is submitted that for the reasons hereinafter set forth at large the circumstance is of no legal significance, the attention of the court is nevertheless invited to the fact that the act of running the blockade had no connection, directly or indirectly, with the acquisition of title to the cotton, such title having been acquired within the body of confederacy in the ordinary course of commercial dealing between persons resident there.

POINTS.

I.

It is established that at the time of seizure the petitioner had actual possession of the cotton, under title by purchase made in the ordinary course of commercial transactions.

II.

There is no infirmity in the petitioner's title growing out of the manner of its acquisition. It is not within the doctrine of Sprott's case, where the plaintiff, in order to prove himself an owner, was first obliged to prove himself a traitor. Nor was title acquired in violation of any principle of public or municipal law.

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1. As a general proposition in jurisprudence, it is true that the existence of a title to property or the manner of its acquisition can only be questioned by parties to the contract concerning it or privies in estate.

   No one not sustaining either of these relations to property is authorized to disturb a possession on the ground of any defect in the title of the possessor, no matter wherein that defect may consist; nor will the defect, if any, constitute a defense to an action for the trespass. To this general proposition no exception is to be found in the jurisprudence of any country, unless it be in our own. None is to be found in any statute of the United States, for the only act having any bearing upon the question being that known as the aban-

doned and captured property act, does not invade this principle; but recognizing the principles of the common law as governing the question of title, it requires proof of a particular personal status as a condition precedent to any redress against the Government for the act of capture and appropriation; and inasmuch as the person whose property has been seized and appropriated is remediless, and can only have that measure of justice which the Government may *ex mero motu* grant, the suitor must thankfully take it *per formam doni*.

The exception, if any, is to be found only in the doctrine laid down by this court in Sprott's case, (20 Wal., 459), in which case the crime of treason having been committed in the very act of the acquisition of title, the court felt constrained to declare the whole transaction, in consequence of its peculiar turpitude, entirely void, and therefore ineffective for the purpose of vesting a title. It is hardly necessary to observe that the general proposition here submitted has no relation to the maxim, *Ex turpi causa non oritur actio* which forbids courts of justice to *enforce executory* contracts embraced within the scope and meaning of the maxim—a principle well illustrated by Hanauer *v.* Doane, 12 Wal., p. 342, and Hanauer *v.* Woodruff, 15 Wal., p. 439.

2. The Act of Congress of July 13, 1861, (12 Stat. at Large, p. 257, sec. 5.), among other things provides that when the President shall have declared any State or part thereof in insurrection "intercourse between the same and the citizens thereof and the citizens of the rest of the United States shall cease." It will be observed that this statutory interdict applies only to citizens, and was, therefore, not an extension, but a limitation of the principle of public law, prohibiting commercial inter-

course in time of war between the inhabitants of the hostile States respectively.

U. S. *v.* Lane, 8 Wall., 195.

The Act of July 2, 1864, (13 Stat. at Large, p. 375, sec. 4), extends the prohibition of the Act of 1861 to commercial intercourse across lines of military occupation, and supplies the omission of the last mentioned act by declaring that the prohibition therein contained shall extend to *all* persons within the United States without regard to citizenship. Its language is:

"All persons within the United States not native or naturalized citizens thereof shall be subject to the same prohibitions in all commercial intercourse with inhabitants of States or parts of States declared in insurrection, as citizens of loyal States are subject to under the said act or acts."

Here, then, it is to be observed that no statute forbade persons inhabiting the body of a hostile State to have commercial transactions with each other or with citizens of foreign and neutral States. It is also to be noted that the cotton in question was purchased by the petitioner in the usual course of commercial transactions with the people of the Confederacy; he at the time in the person of an agent residing and trading within the so-called Confederate States.

Lapene *vs.* U. S., 6 N. & H., 363.
Faulkner *v.* U. S., 5 N. & H., 612.

The second branch of the main proposition, namely, that the acts of Congress prohibiting commercial intercourse were not violated, is then clearly established; but if it were otherwise, it would not, for reasons hereinafter stated at length,

impair the title of the petitioner or deprive him of redress.

3. That no *principle of public or of municipal law* was violated in the transaction is a self-evident proposition. But upon the question of the petitioner's right to the remedy provided by statute, it will be necessary to consider what bearing the general principles of such laws have upon the legal quality of transactions of this character. For convenience, this subject will be more fully considered later under another head.

III.

There was no law under which cotton so owned and possessed could be seized and confiscated by the federal government, with or without judicial proceedings to that end, nor was there any attempt at confiscation.

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1. The Act of 1861 (12 Stat. at Large, p. 257, sec. 5) provides that "all goods and chattels, wares and merchandise coming from said State or section into the other parts of the United States, and all proceeding to such state or section by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States," and the statute, of course, contemplates the usual judicial proceedings to that end.

The Act of August 6, 1861 (12 Stat. at Large, p. 319, sec. 1) provides, in substance, that if any person shall purchase or acquire, sell or give any property with intent to use or suffer the same to be used in aiding,

abetting or promoting the insurrection; or if any person, being the owner of such property, shall, knowingly, use or employ the same, or consent to the use or employment of the same in aiding the insurrection, *all such property* is hereby declared to be lawful subject of prize and capture wherever found, and it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned.

The act of July 17, 1862 (12 Stat. at Large, p. 589), entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," designates classes of persons against whom penalties are denounced and whose property is declared to be subject to seizure and judical condemnation.

Neither the person or the property of the petitioner is within the purview of either of these statutes. *There was no statute therefore under which the Federal government could have divested the petitioner of his title to this cotton by judicial proceedings, or by seizure without them, or in any manner whatever.*

2. The capture and appropriation of this cotton as booty of war would have violated a settled rule of public law.

Civilization, as it advances, constantly and consistantly endeavors to localize the field, lessen the number and mitigate the severity of the evils attending war It has accordingly become an axiom of public law. that private property on land "is exempt from confiscation, with the exception of such as may become booty in special cases when taken from enemies in the field or in beseiged towns, and of military contributions levied upon the inhabitants of the hostile territory."

Lawrence's Wheaton, p. 596.

Chancellor Kent says:

"The general usage now is not to touch private property upon land without making compensation, unless in special cases dictated by the necessary operations

of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation."

Lect. V, vol. 1, p. 92.

It is unnecessary to multiply authorities, for this court at a very early day recognized the principle and has since frequently reiterated it. War is waged by civilized states in subordination to this principle of public law; and until a hostile state has in derogation thereof conferred express authority to violate it (which authority under our system of government can only be conferred by an act of Congress), a capture in violation of it is wrongful, and confers no right that will be recognized by any judicial tribunal.

Brown *v.* U. S., 8 Cranch, 110.

The Act of Congress known as "The Captured and Abandoned property Act," in so far as it authorizes the capture of cotton, the property of private persons, is manifestly in derogation of this rule of public law; but it was a careful and guarded modification of that law to meet the exigencies of a novel situation and intended to interfere only so far with rights of private property as the exigencies of the case and the object in view required.

Klein's Case, 13 Wall., 136.

Haycraft *vs.* U. S., 22 Wall., 94.

Cotton was the rebellion's strongest sinew of war. The Federal government authorized it to be taken from its possessors not for confiscation but for preservation; as this court declares in the case last mentioned,—"the Act of Congress looked to its preservation, but authorized its capture—" recognizing to the fullest extent "the humane maxims of the modern law of nations, which exempts private property of non-combatant enemies from capture as booty of war."

To have held otherwise would have been to suppose that Congress intended to authorize confiscation without judicial form or ceremony, a barbaric practice which no civilized state can afford to adopt or defend. It would have been to declare that Congress intended

to stamp upon this kind of private property the character of booty, an act that would have shocked the moral sense of christendom.

All private property within the borders of a hostile state tends in greater or less degree to feed and nourish its warlike powers, and the mere fact that one class of private property (not embraced within the received definition of munitions of war) happened to be more useful for that purpose than another, would no more authorize its confiscation without judicial process, or its capture as booty of war than it would authorize the gold and silver coin of all the inhabitants of the hostile state to be dealt with in the same manner.

The decisions of this court under the act in question have maintained and advanced its great reputation as an expounder and conservator of public law. In all the cases, from Mrs. Alexander's cotton, in 2d Wallace, to the case of Haycraft *vs.* the United States, in the 22d and last volume, the court has constantly maintained that it was not the intention of the statute that the act of capture should divest the title of the owner, and that while the possession was changed the title remained unaffected. In conformity with this view, that the right of property antecedently existed, the court has held that the proclamation of general amnesty removed the *bar to the remedy*. Manifestly, if the right and title had been divested by the seizure they would not have been restored by that proclamation in any case. The maxim, *Ubi jus ibi remedium*, is ancient and well approved. The recognition of its justice gave occasion for the invention of that form of action called an action on the case (Broom's Legal Maxims, p. 147.) I proceed now to inquire whether there is in the case at bar, contrary to this maxim, a right without a remedy for its enforcement.

IV.

The petitioner, as a British subject, is qualified to sue within the Act of 1868. *The condition annexed to the remedy by the Act of* 1863, *that the petitioner must prove that he has never given aid or comfort to the rebellion, is satisfied when he proves that he has violated no law in the premises, i. e., that he did not unlawfully give aid and comfort. This is established when, as in the present case, there being no prescribed regulation of municipal law, he shows that he has violated no principle of public law, or by showing that the offense, if any, has been obliterated by pardon or amnesty. The condition annexed to this remedy is in the nature of punishment for crime, but the exercise of a legal right can never be imputed as an offense.*

Actus non facit reum nisi mens sit rea.

Cessante ratione legis cessat ipsa lex.

That the petitioner, being a British subject, is entitled to sue within the act of 1868, is settled.

U. S. *v.* O'Keefe, 11 Wal., 178.

But it is contended, that because it appears that during the rebellion the petitioner ran the blockade on mercantile adventures he cannot recover. And the argument on behalf of the government is, that while running the blockade had no immediate, nor, for that matter, so far as appears, any remote connection with the acquisition of title to the cotton; nevertheless, as an independent and disconnected act, it amounted to giving aid and comfort to the rebellion, and bars a recovery, and that this consequence follows without regard to the intrinsic quality of the act in law.

It is a proposition of universal acceptation that the received rules of public law constitute a part of the municipal law of every State within the pale of public law, and these rules are not subject to essential modi-

fication by the legislation of particular States. This rule is embodied in the Federal Constitution (article 1, sec. 8, par. 10), and our own government has always, and under very trying circumstances, firmly maintained and consistently acted upon this doctrine. Yet, in order to sustain the argument now put forward on behalf of the government, it is necessary to impute to Congress, without color of authority, an intention to annex to the act of blockade running a definition and penal consequence entirely unknown to public law. The court is invited to define blockade running as aiding and abetting the rebellion, whereas it is but the exercise of a perfectly lawful right on the part of a neutral to trade with a belligerent. In the next place, the court is invited to declare the act, which it is requested so to define, a bar to the petitioner's remedy, and thus, indirectly, to annex to the act of blockade running the penalty of forfeiture of property and confiscation thereof without form of law, whereas the risk of capture, in the act, is the only risk or penalty attending it known to public law.

Character is no less important to nations than to individuals, and the obligations imposed by a due regard for honor and the received rules of morality and natural justice are as binding in the one case as in the other. When, therefore, a government finds itself in possession as trustee of the property of another, and especially when the owner is a citizen of a foreign State, it ought not to be astute in the invention of defenses and devices for retaining that to which it has no right.

For the government to refuse a suitor restitution of property admitted to be held in trust for him as the real owner, on the ground that he is without remedy for the enforcement of his right, when the government alone can give the remedy, would be opposed to generally received doctrines of morality.

But the argument advanced on behalf of the government is utterly groundless. It furnishes a striking illustration of the maxim *qui haeret in litera haeret in*

cortice (Broom's Max., 657). "The law of England respects the effect and substance of the matter, and not every nicety of form and circumstance. The reason and spirit of cases make law and not the letter of particular precedents."

Ibid.

"Words in statutes, if they be general and not express or precise, shall be restrained unto the fitness of the matter or person."

Bacon's Maxims, pp. 52, 58, 59.
Plowd., 467.
Dwarris Stat., 551.

All the old doctrine of constructive treason was based on a violation of this rule. "It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body, the sense and reason of the law is the soul."

Eyston *v.* Studd., Plowd., cited Dwarris Stat., 552.

"Every statute ought to be expounded not according to the letter, but according to the meaning; *qui haeret in litera haeret in cortice*" (11 Rep., 73). Therefore the Bolognian law mentioned by Puffendorf, which enacted that whoever drew blood in the streets should be punished with the utmost severity, was held *after a long debate not to extend to the surgeon who opened the vein of a person that fell down in the street with a fit.*

1 Bla. Com., p. 61.

The rule in Heydon's case (3 Rep., 7) has always been approved. By this rule "the letter of an act has been sometimes enlarged, sometimes restrained, and sometimes, it has been said, even contradicted."

1 Bla. Com., 87.

This court has said that "all general terms in statutes should be limited in their application so as not

to lead to injustice, oppression or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended that will avoid results of that nature."

Carlisle *v.* U. S., 16 Wall., 153.

It has also said that municipal enactments will never be construed to conflict with the public law if such a construction can be avoided.

Talbot *v.* Seaman, 1 Cranch, 1.
Murray *v. Charming Betsey*, 2 Cranch, 64, 118.

It is then a very clear proposition that the mere fact that by running the blockade, or any other course of conduct, the petitioner gave aid and comfort to the rebellion, is immaterial and without legal force or significance *unless it also appears that in so acting the petitioner violated some law.* Reason and law both declare that "he is not to be esteemed a wrong doer who merely avails himself of his legal rights," for *Nullus videtur dolo facere qui suo jure utitur.*

Broom's Max., 132.

It it therefore the legal nature and quality of the defendant's acts that are in question. To determine this question, resort must be had to the rules of public law. In this law there will be found no support for the fanciful theory that the citizen of a neutral state by evading a blockade and trading with a belligerent *unlawfully* gives him aid and comfort, whatever he may carry to him. The consequences and incidents of such commerce are there clearly defined, and no court can recognize any other.

The establishment of the blockade itself admitted, as towards neutrals, the status of the Confederacy as a belligerent. Its standing in this respect was admitted by the Federal Government in the fullest manner, as the history of the period shows.

The Prize Cases, 2d Black., 635.
See also The United States *v.* McRae, 8 Eng. Law Rep., Eq. 69.
The United States *v.* Prioleau, 2 Hem. and M., Chancery Cases, 559.

This court has, in several relations, recognized the Confederacy as a belligerent and the Government of the Confederate States as a Government *de facto*,

Mauran *v.* Ins Co., 6 Wall., 14.
Thorington *v.* Smith, 8 Wall., 10.
Brown *v.* Hiatts, 15 Wal., 177.

The tendency of modern public law is to restrict the rights of belligerents to interfere with the commerce of neutral States within the narrowest practicable limits. When our Government came into existence and assumed its place in the family of nations, our statesmen and jurists were wise enough to see that the geographical situation of this country and the eminently commercial character of the people dictated the adoption and maintenance of the most advanced doctrines in regard to neutral rights.

Chancellor Kent says, vol 1, p. 142: "It was contended on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling articles contraband of war to the belligerent powers; but it was successfully shown on the part of the United States, that neutrals may *lawfully* sell at home to the belligerent purchaser, or *carry themselves to* the belligerent powers, contraband articles subject to the right of seizure *in transitu*."

In another place he says:

"The consequence of a breach of blockade is the confiscation of the ship; and the cargo is always *prima facie* implicated in the guilt of the owner or master of the ship. * * * The old doctrine was much more severe, and often inflicted not merely

a forfeiture of the property taken, but imprisonment and other personal punishment: but modern and milder usage has *confined* the penalty to the confiscation of the *ship and goods.*"

Kent, 1, 151.

No court, before or since, has taken higher ground on this subject than this court in the case of the *Santissima Trinidad*, 7 Wheaton, 283. It arose out of the war between Spain and her rebellious South American colonies. The court in that case declared that, "the sending of armed vessels or munitions of war from a neutral country to a belligerent port, for sale as articles of commerce, is unlawful *only* as it subjects the property to confiscation and capture by the other belligerent," and that "no neutral State is bound to prohibit the exportation of contraband articles." Mr. Justice Story who delivered the opinion of the court, among other things, says: "The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship-of-war *during the voyage*, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations; but there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which *only exposes the persons engaged in it to the penalty of confiscation.*"

7 Wheaton, 341.

In Richardson *vs.* Marine Ins. Co., 6 Mass., 113, Chief Justice Parsons said: "A neutral merchant is not obliged to regard the state of war between other nations,

but if he ships goods prohibited *jure belli* they may be rightfully seized and condemned. It is one of the cases where *two conflicting rights may exist, which either party may exercise without charging the other with doing wrong.*"

In Seton, Maitland & Co. *vs.* Low, 1 Joh. Ca., 1, in an action on a policy of insurance from New York to Havana on "all kinds of lawful goods laden," it was held that "articles contraband of war were lawful goods within the meaning of the policy; that goods not prohibite i by the positive law of the country to which the vessel belongs are lawful; that the insured are not bound to disclose to the insurer that the goods insured are contraband of war; and that a neutral nation is under no moral obligation to abandon or abridge its trade in consequence of war between two others; yet a belligerent may seize and confiscate contraband goods upon the principle of self-defense."

Judge Kent observes (p 5):

"It may be said that the law of nations is part of the municipal law of the land, and that by that law contraband is prohibited to neutrals and consequently unlawful. This reasoning is not destitute of force, *but the fact is that the law of nations does not declare the trade to be unlawful.*"

To the same effect are the observations of Dr. Lushington in a recent case.

"The defendants say that the agreement to break the blockade by a neutral ship is on the part of all persons concerned illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo* this contract was illegal by municipal law. Now a good deal may depend on the sense in which the word illegal is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal

so far that if carried out they would lead to acts which might under certain circumstances expose the parties concerned to such penal consequences as are sanctioned by international law for breach of blockade or for the carrying of contraband. If so, the illegality is of a *limited character*."

The *Helen*, 11 Jurist, N. S., pt. 2, p. 1,025.

Not only is the risk of capture the only incident attaching to such commerce, but the property subject to capture and forfeiture "must be taken *in delicto*."

The *Ionia*, Robinson's Adm. Reps., p. 168.
The *Isabella Thompson* and cargo, Blatchford's Prize cases, 377.
The *Wren*, 6 Wal., 582.
The *Circassian*, 2d Wal., 135.

And then it is only on judicial condemnation that forfeiture follows:

The *Thomas Gibbons*, 8 Cr., 421.
The *May*, 9 Cr., 126.
The *Rapid*, 1 Gall., 295.
The *Joseph*, 1 Gall., 545.

The doctrine of the foregoing authorities has been recently and very broadly affirmed by this court.

The *Bermuda*, 3d Wal., 514.
The *Peterhoff*, 5 Wal., 28.

The examination of the American doctrine on this subject may be appropriately concluded by reference to certain public papers.

See note of Mr. Munroe, Secretary of State, to the Spanish minister March 20, 1816, American State papers, Vol. IV., pp. 156–158 (Wh. 846, n. 241); Mr. Adams, secfetary of state, instructions to Mr. Nelson, minister to Spain, April 28, 1823. Cong. Doc. accomp. President's message, December, 1824, pp. 269–285

(Wh. 847, n. 241); Lord John Russell in House of Commons, June 27, 1861, in reference to New Granada (Wh. p. 848, n. 241), Parliamentary Papers, 1862; North America, No. 1, p. 72; Lord Lyons to Lord John Russell, Aug. 12, 1861 (Wh. 555, n. 175); Opin. of Attorney-Gen., vol. 11., pp. 299–300; Webster's works, vol. VI., p. 452.

The policy of the English government and the decisions of its judicial tribunals are on this subject in perfect harmony with our own. The whole question has been most exhaustively and elaborately dealt with in two cases growing out of the rebellion.

Ex parte Chavasse *vs.* Grazebrooke, 11 Jurist, N. S., pt. 1, p. 400.
The Helen, 11 Jurist, N. S. pt. 2, p. 1025.

In the first case the opinion is by Lord Chancellor Westbury; in the second by Dr. Lushington. By both the American authorities are reviewed and affirmed, and by each all the principal text books are cited as proving the doctrines. See particularly Wheaton, p. 809; Halleck, 516; Phillimore, 3d vol. p. 238. Vattel, p. 336.

Upon the foregoing authorities then, it is submitted that the government can find no justification in the principles of public law for the indirect confiscation of the petitioner's property, as a penalty for having in commercial enterprises to the insurgent States, evaded the blockade during the late rebellion, *for such enterprises were perfectly lawful.*

V.

Reiterating the proposition that giving aid and comfort by running the blockade for commercial purposes cannot constitute a bar because it cannot be imputed as an

offense, it is submitted that if the contrary thereof be maintained then the offense was obliterated by the general pardon and amnesty which embraces all persons and all offenses involved in the general description of "giving aid and comfort to the rebellion."

The proclamation of amnesty recites among other things that "it is believed * * * that a "*universal* amnesty and pardon for participation in "said rebellion, extended *to all* who have borne any "part therein, will tend to secure permanent peace, &c." * * * 15 Stat. at Large, 712.

The President then proclaims and declares "uncon- "ditionally and without reservation to *all* and *every* "*person who directly or indirectly participated in the late* "*insurrection or rebellion, a full pardon and amnesty for* "*the offense of treason against the United States, or of* "*adhering to their enemies during the late civil war, with* "*restoration of all rights, privileges and immunities un-* "*der the constitution and laws which have been made in* "*pursuance thereof.*"

It is not in the power of language to enlarge the scope of this proclamation—it is as large as the world and as comprehensive as the human race, unlimited and unconditioned by nationality, time, place, form or circumstance.

At one time the Court of Claims entertained and acted upon the singular idea that amnesty and pardon did not dispense with proof that the claimant had not given aid and comfort—abstracting the wrongful or criminal quality from the act, they held that *per se* the act was a bar, assuming it to be perfectly innocent. This court, of course, speedily corrected this erroneous notion, and held that pardon and am-

nesty by obliterating the offense, if it ever existed, dispensed with any proof on the subject.

Klein's case, 13 Wal., 128.
Armstrong's case, Id., 154.
Pargoud's case, Id., 156.

If it was an offense at all on the part of a person situated as this claimant was situated, to give aid and comfort by carrying on commercial intercourse with the people engaged in the rebellion, and evading the blockade of their ports, it was, on principles of public law, none the less an offense because the principal actor was not at the time within either federal or confederate jurisdiction.

This subject is very ably discussed, and all the authorities cited by Mr. Wharton in the eleventh chapter of his work on Private International law, among other things he says: "The sturdiest advocates of the hypo- "thesis that the *locus delicti* alone confers jurisdiction "have admitted that there are cases in which a person "whose residence is outside the territory may make "himself, by conspiring extra-territorially to defeat "its laws, infra-territorially responsible." Sec. 876.

Among other illustrations he puts the case of a person who, in one State employs an innocent agent to obtain goods by false pretenses in another, and shows by the citation of numerous American and English authorities, that the employer is amenable to the law of the State in which the offense is consummated, whenever he is brought into such relation to the law that it can act upon him, and that no temporary inability to reach him affects his status as an offender. Sec. 877.

When a State can punish, clearly it can pardon, and if it can in this case it has done so.

Demonstrably, then, one or the other of these propositions is true.

1. The law cannot be regarded as contemplating the punishment, in any form, of an act containing no element of wrong, but only of risk, without violating

the plainest principles of reason and justice; and hence, if the claimant was guilty of no offense, the act is no bar, or—

2. That being an offender his offense was obliterated by the proclamation of amnesty and pardon. *Omne majus continet in se minus* is a maxim of logic, but the learned judge below, who dissented, would have us understand that this proclamation, while it washed the blood from red-handed treason, left the offense of evading a blockade (assuming it to be one) to be punished by an indirect confiscation of property. The head and heart join in dissenting from such a proposition. The government has already, by eleven years' use of this fund, deprived its owner of a sum of interest nearly equal to the principal. It is not too much to ask that the trust be now executed by a surrender of the principal without interest.

W. W. MacFarland,
Of Counsel.

Denver & Peck,
Solicitors.

Wm M Evarts
of Counsel

Supreme Court of the United States.

JOHN YOUNG, ASSIGNEE AND TRUSTEE IN BANKRUPTCY OF ALEXANDER COLLIE,

vs.

THE UNITED STATES.

No. 119.

PETITION FOR WRIT OF CERTIORARI.

Deny certiorari
Denied March 14 1877

WASHINGTON, D. C.:
GIBSON BROTHERS, PRINTERS.
1877.

Brief filed

Supreme Court of the United States.

JOHN YOUNG, ASSIGNEE AND TRUSTEE IN BANKRUPTCY OF ALEXANDER COLLIE,
vs.
THE UNITED STATES.

No. 119.

In the matter of the application of John Young, assignee and trustee in bankruptcy of Alexander Collie, for a writ of certiorari to the Court of Claims.

To the Honorable the Supreme Court of the United States:

The petition of John Young, assignee and trustee in bankruptcy of Alexander Collie, respectfully shows:

That your petitioner is such assignee and trustee, and is a subject of her Majesty the Queen of Great Britain, and resides in the city of London, in said kingdom.

That the rights of your petitioner, as such assignee and trustee, accrued after the judgment hereinafter mentioned in favor of said Collie, in the Court of Claims, and after the appeal taken by the defendants to this court.

That at all times during the war of the rebellion in the so-called Confederate States, and up to the filing of the claim hereinafter mentioned in the Court of Claims, the said Collie was a subject of her said Majesty the Queen of Great Britain, and domiciled there, and during all of said period was never absent from said kingdom, unless temporarily

in some other country in Europe, and was never at any time during said period within the United States or the so-called Confederate States.

That during the progress of the war of the rebellion the said Collie became the owner of a large amount of cotton, which was stored in the city of Savannah, in the State of Georgia.

That upon the occupation of that city by the United States forces, under General Sherman, in the month of December, 1864, the said cotton was taken possession of by said forces, and by them turned over to the agents of the Treasury Department. That said cotton was by said agents sold, and the proceeds thereof, amounting to the sum of $952,076.71, was paid into the Treasury of the United States early in the year 1865.

That shortly afterwards, and within the time prescribed by statute, the said Collie filed his petition in the Court of Claims for the recovery of the said proceeds, under and in accordance with the provisions of the acts of Congress in regard to captured and abandoned property.

That testimony was taken in the Court of Claims from time to time by both claimant and defendants, prior to the establishment and organization under the Treaty of Washington of the Mixed Commission for the determination of British and American claims.

That while said claim remained so pending in the Court of Claims the claimant also filed his claim and petition in the Mixed Commission, being induced thereunto by the circumstance that in the Court of Claims he was limited and restricted by statute to claiming only the amount which reached the Treasury of the United States as the alleged avails thereof, without interest, after a forced sale, and heavy expenses, direct and indirect, charged against the same; while in the Mixed Commission, the said Collie

could and did prefer his claim for the real value of his said cotton, without deductions and with interest, and which when so preferred before the Mixed Commission amounted to more than three times the amount claimable or obtainable in the Court of Claims.

That the claim of said Collie in the Mixed Commission was dismissed by that tribunal for alleged want of jurisdiction, on account of the pendency of the claim in the Court of Claims, and without prejudice to its prosecution therein.

That thereupon the prosecution thereof in the Court of Claims, which had been in the meantime temporarily suspended, was again actively resumed, and further evidence was taken by the claimant upon commission therein, and such further proceedings were thereupon and therein had that the cause was regularly brought forward for trial according to the practice and the manner and form of procedure in the said court.

That such proceedings had been taken by the claimant; that the cause was ready for trial, and the claimant entitled to a trial in the latter part of the year 1873 and the early part of the year 1874.

That the method of procedure in said court, under which the claimant became so entitled, required that when the claimant had completed and filed his proofs he should cause the same to be printed, and that when printed he should enter the cause upon a book provided for that purpose, called a notice-book, and that when the said cause had been upon said notice-book for two months, the claimant having first filed his brief, he might have the cause transferred to the trial calendar of the court, and when upon such calendar the claimant was entitled to have the same tried when reached in its turn upon the call of the calendar.

That all of said proceedings were duly taken by the claimant, whereby the Attorney-General had full notice for two months, and for such further time as the cause might be delayed by the condition of the calendar, of the proofs which were to be relied upon by the claimant, and which notice in this case was in fact more than four months before the trial.

That during the month before the cause was reached for trial, namely, in the month of February, 1874, the attorney for the United States, who had the principal charge of the cause on behalf of the Government, stated to the local attorney and counsel of the claimant that upon the trial he wished to prove that the claimant had adhered to the enemies of the United States, and that the facts which he wished to prove were indicated, set forth, and referred to in a large number of documents which had been collected and set apart in the bureau of rebel archives as relating to the acts of the claimant during the war.

That he suggested to said attorney that he should call at the place where the rebel archives were kept, and examine the said documents.

That the said attorney accordingly went to said place and found that the same had been set apart by the person in charge thereof for his perusal, and the said documents were placed at his disposal, and he carefully inspected and perused the same.

That said documents had been, prior to March 12, 1873, so collected and set apart by the officers of the Government for use, in case the same were competent for that purpose, against the claims of said claimant in the Mixed Commission.

That the same had been on said 12th of March, 1873, duly certified for use as evidence in said Commission by the Secretary of War, and the same had been so used and

put in evidence in said Commission by the counsel acting therein for the Government against the claims of said claimant, and the same were printed, and eight printed copies served upon the claimant's special counsel in the summer of 1873, being more than eight months before the trial of the cause in the Court of Claims.

That after the examination of said documents by the said attorney, the Government attorney stated to him that he would move for a continuance of the cause unless the claimant should either admit in evidence the matter contained in said documents, or admit the printed record thereof as printed in the Mixed Commission, or admit by stipulation that the claimant, during the progress of the war, ran the blockade with arms, amunition, and other material of war.

That in the absence of his client from the country, and the shortness of time not allowing communication with him by letter, the said attorney was unwilling to stipulate anything more than the general fact that his client had run the blockade, and beyond that leaving the matter so that if the Government wished to make proof of anything further or more specific it would require to be done after taking the judgment of the court upon the motion for a continuance.

That the said Government attorney, after consideration and deliberation, determined to avail himself of the stipulation offered as admitting all that the Government need to adduce, and thereupon decided to try the cause without further delay, and without attempting to prove the matters referred to in said documents, accepting such stipulation as the full legal equivalent thereof, and the cause was accordingly tried when reached upon the calendar, the Government insisting that the claim should be defeated by reason of the said Collie having adhered to the enemies of the United States by the admitted running of the blockade.

That, after due deliberation, judgment was rendered on the 15th day of May, 1874, in the Court of Claims, in favor of the claimant, for the sum of $952,076.71.

And your petitioner further shows to your Honors that the said documents, which were so under the consideration of the said Government attorney who conducted the trial of the cause, and which, under his suggestion, in the month before the trial, were so perused and inspected by claimant's local attorney and counsel, and which had in the previous year been put in evidence in the Mixed Commission by the Government against the claimant, and printed copies of which were served upon his special counsel, consisted of letters written by the claimant to officials of the rebel Government and others, and letters, or copies thereof, written to him by such officials and others, contracts signed by him, bills of lading, or manifests of blockade-running vessels; and such documents tended to show that said claimant during the late civil war carried on a very extensive trade with the States in rebellion, including the shipment to quartermasters and other officials or agents of the insurrectionary States, or some of them, of material contraband of war, and also including the present of a battery of six so-called Whitworth guns to the State of North Carolina, and a receipt from a rebel quartermaster for the consideration upon sale of a blockade-running steamer.

That some of these documents were originals and some of them were certified copies.

That most of the persons who had written or signed the said documents, or who were indicated as having full knowledge of the matters referred to therein, were persons then and now of great prominence, and within the reach of the Court of Claims by subpœna, commission, or other writ of process.

That the said documents either contained a full history

of the transactions of the claimant above mentioned or referred to them in such a manner as to give the easiest access to the minute particulars thereof and the names of the persons by whom the same could be proven.

And your petitioner shows that the said documents and the facts indicated therein were thus fully under the notice and within the knowledge of the counsel for the Government who tried the cause in the Court of Claims before and at the time of said trial, and that the introduction or non-introduction of the same in evidence upon such trial was subject of consideration and deliberation of such counsel.

And your petitioner further shows unto your Honors that afterwards, namely, on the thirtieth day of June, 1874, an appeal from the judgment of the Court of Claims to this court was prayed for by the defendants and duly allowed, and that said appeal has been duly perfected by bringing the record out of the Court of Claims and into this court, and thereby the said cause has come under and within the jurisdiction of this court and without the jurisdiction of the Court of Claims.

That the same has been so pending in this court for upwards of two years and a half. That when the same was about being reached the claimant was ready for argument, but the Assistant Attorney-General, who had charge of the said cause, asked that the same be passed for purposes of his personal convenience connected with the preparation of his brief, and the same was so passed, with the understanding that the same should be put upon the day docket for December 4 last, for argument; but before the same could be so brought on for argument a motion was filed in the Court of Claims for a new trial.

The said motion, purported to be filed under and in pursuance of the act of Congress approved June 25, 1868,

which provides that the Court of Claims at any time while any claim is pending before it or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States.

That such motion was filed by the Attorney-General on or about the 8th day of December, 1876, and was so filed upon the affidavits of Mr. John J. Key and others, all of said affiants other than said John J. Key being resident in Great Britain, and not now or at any previous time in any manner connected with the office of the Attorney-General, or officially or otherwise cognizant of the circumstances connected with the trial of the cause in the Court of Claims, or the preparation therefor. That no affidavit or testimony of the Attorney-General himself is filed in support of the motion.

That the affidavit of Mr. Key states that he had been employed as special counsel in the cause upon the 13th of July, 1876, but does not state that he had any connection with the cause before that, or any knowledge in regard to the same whatever.

That no affidavit by the former Attorney-General of the United States, who held that office at or before the time of said trial, nor by any person then connected with his office, is filed in support of said motion.

And your petitioner further shows to your Honors that the said motion, and the affidavits and exhibits filed in support thereof, present, as the alleged grounds for a new trial, only the same facts which were indicated and set forth by the said documents, so inspected by the local attorney of the claimant as aforesaid, and used by the

United States in the Mixed Commission, and which were fully known and duly considered by the Government attorney in charge of the trial of the cause before and at the time of such trial.

And your petitioner further shows unto your Honors, and charges that the full legal scope, purpose, and intention of the said statute is that the court in which the judgment was rendered might, in derogation of the principles of the common law, grant a new trial even after the cause by appeal has been brought into this court, whenever it should be shown to them upon a new case made that any fraud, wrong, or injustice has been practised upon the United States in obtaining the judgment, and that said Court of Claims has not, under such statute or otherwise, jurisdiction, power, or authority to grant a new trial in a cause which is in this court upon appeal, because by reason of a change of officers in charge of the Government causes there is a difference of opinion between former and present Government law officials as to the importance or bearing of facts well known to the Government counsel at and before the time of the trial.

And your petitioner shows unto your Honors that in violation of these principles, and outside of and beyond the power conferred upon them by said statute, the said Court of Claims has arbitrarily, and by usurpation of jurisdiction and authority, entertained said motion, and has in fact ordered a new trial in said cause.

And your petitioner further shows that all of the so-called proofs presented in support of the said motion are *ex parte* affidavits and exhibits referred to therein, and are not evidence within the meaning and scope of the said statute, but that if the said alleged proofs were admitted to be sufficient in form they do not show and do not tend to show in any degree that the facts thus presented were

not fully known to the Government counsel who tried the cause before the trial thereof, and that by reason of this insufficiency, failure, and defect, the said motion and affidavits do not show, or in any degree tend to show that any fraud, wrong or injustice has been practised upon the Government.

And your petitioner further shows to your Honors that upon said motion the claimant showed affirmatively, and without attempted contradiction or denial, that the matters and facts so set up by the Government were well known to the Government attorneys who tried the cause at and before the time of such trial.

And your petitioner therefore saith, that in considering said motion, and in assuming to grant a new trial thereupon, the Court of Claims acted in the pretended exercise of a power conferred by statute, but in disregard and violation of the limitations imposed by such statute, in this, that the fraud, wrong, or injustice referred to in said statute, as your petitioner is advised, does not refer to an error by the court in granting the judgment, nor to any supposed error by the law officers of the Government as to which of the facts within their knowledge they shall adduce or withhold on the trial, even if their successors should disapprove such exercise of judgment, but that said statute refers only to a new case, showing, by competent evidence, that some fraud, wrong, or injustice has been practised by the claimant upon the Government, and, therefore, your petitioner claims that the Court of Claims acted in the premises without authority of law.

And your petitioner further shows unto your Honors, that in the class of cases, of which this is one, arising under the captured and abandoned property act of 12th March, 1863, the judgments of the Court of Claims have been understood and construed to be judgments against a

special fund, the proceeds of the property sued for in each case, and as the amount held in the Treasury to respond to such judgments is limited by the sum received, interest has not been allowed upon such judgments.

That the fund in this cause, amounting to $952,076.71, has been in possession of and used and enjoyed by the Government for twelve years last past.

That the annual interest accruing to the Government and lost to the claimant is about $60,000, and whatever might be the result of any new trial the awarding of such new trial is sure and great advantage and profit to the Government, and sure and great disadvantage and loss to your petitioner. That the loss of interest to your petitioner from the time of the rendition of the judgment in his favor by the Court of Claims to the time of the alleged order for a new trial is over $150,000.

All of which matters and things are to the manifest detriment and injury of your petitioner, and tend to abridge, impair, and oust the jurisdiction of your Honors in the said cause now of record in your court, and under the jurisdiction thereof, and in case of the affirmance of said judgment of the Court of Claims in favor of your petitioner, or in case of the dismissal of the said appeal, the same tends to the impairment and invalidity of your Honors' mandate to be issued herein.

Wherefore your petitioner prays for your Honors' writ of certiorari to be issued out of your court, to be directed and delivered to the said Court of Claims, commanding them to return and certify to you the alleged proceedings and the record thereof for the alleged granting of such new trial, and tending, as aforesaid, to the impairment and ouster of your Honors' jurisdiction over this cause, and to the invalidity of the mandate of your Honors to be issued herein, and also to the loss and injury of your petitioner,

to the end that the same may be inquired into by your Honors and here reviewed, and that justice may be done in the premises, and the said alleged order granting such new trial be vacated, set aside, and held for nothing; and that your petitioner may have such other and further relief in the premises as shall seem proper to your Honors.

And your petitioner will ever pray, &c.

JAMES THOMSON,
C. F. PECK,
Attorneys for Petitioner.

WM. M. EVARTS,
W. W. MacFARLAND,
of Counsel.

CHARLES F. PECK, being duly sworn, deposes and says that he is one of the attorneys for the petitioner herein, and was one of the attorneys for Alexander Collie in the Court of Claims in the cause in the above petition referred to; that deponent has general knowledge of the allegations of the foregoing petition, and that the petition is true, except as to the matters therein stated on information and belief, and as to those matters deponent believes it to be true.

Sworn to before me this 22d day of January, 1877.

D. W. MIDDLETON,
Clerk of U. S. Supreme Court.

United States Supreme Court.

JOHN YOUNG,

Assignee and Trustee in Bankruptcy of ALEXANDER COLLIE,

Appellee,

vs.

THE UNITED STATES,

Appellants.

Brief of Appellee upon Petition for Writ of Certiorari.

JAMES THOMSON,
CHARLES F. PECK,
Attorneys for Petitioner.

W. W. McFARLAND,
WILLIAM M. EVARTS,
Of Counsel.

WASHINGTON, D. C.:
GIBSON BROTHERS, PRINTERS.
1877.

United States Supreme Court.

JOHN YOUNG, Assignee and Trustee in Bankruptcy of Alexander Collie, Appellee,

vs.

THE UNITED STATES, Appellants.

Brief of Appellee upon Petition for Writ of Certiorari.

The petitioner, John Young, as assignee and trustee, was substituted for Alexander Collie, as appellee, since the cause has come within the jurisdiction of this court.

Alexander Collie, the original claimant, being a British subject, and throughout the whole period of the war of the rebellion domiciled in England, owned a lot of cotton in the city of Savannah, which was captured by General Sherman's army in December, 1864.

This cotton was sold by the Treasury agents, and the net proceeds thereof, reported at $952,076.71, were paid into the United States Treasury early in 1865. Collie thereupon filed his claim for such proceeds in the Court of Claims, under the captured and abandoned property act, and both claimant and the Government proceeded with the taking of their testimony in said court.

While the claim was so pending and undetermined in the Court of Claims, the Mixed Commission for British

and American claims was organized under the Treaty of Washington, and Collie entered his claim in such Commission because therein he was not restricted to claiming only the net proceeds without interest and after a forced sale and the payment of enormous sums for expenses, but could in the Commission claim the fair value of his merchandise with interest thereon. The claim was dismissed by the Commission on account of its pendency in the Court of Claims, and without prejudice to its prosecution there.

While the claims of Collie were pending in the Mixed Commission, the counsel for the United States, for purposes of defence to the same, caused to be collected together in the bureau in Washington of rebel archives a large number of documents relating to the operations of said Collie during the war, and consisting of letters written by him to officials of the rebel government and others, and letters, or copies thereof, written to him by such officials or others, contracts signed by him, and bills of lading or manifests of blockade-running vessels; such documents tending to show that said claimant during the war carried on a very extensive trade with the States in rebellion, including shipments of material of war.

All these documents were authenticated together by the Secretary of War under date of March 12, 1873. They were also put in evidence by the United States against Collie in the Mixed Commission, and printed therein, and copies served upon Collie's counsel in the summer of 1873.

After the dismissal of the claim by the Mixed Commission, further testimony was taken in the Court of Claims, and claimant's counsel brought the case forward for trial by a course of proceedings usual in that court, and in course of which the Government counsel had four months of notice for their preparation. All the documents and material in the rebel archives were well known to the Gov-

ernment counsel who prepared and tried the cause, and the introduction or non-introduction thereof upon the trial was subject of consideration with him, and even of interviews between him and claimant's counsel, resulting in the former obtaining from the latter a stipulation that the claimant was a blockade-runner.

The cause was tried in March, 1874, and the Government counsel, in the exercise of his judgment, did not introduce the documents in evidence, but made use of the stipulation obtained by him from claimant's counsel.

After due deliberation judgment was rendered May 15, 1874, in the Court of Claims in favor of the claimant for $952,076.71. The defendants on June 30, 1874, brought the cause into this court by appeal.

The cause worked its way up on the docket of this court until the same was about being reached in November, 1876, and appellee's counsel were ready for argument. The Assistant Attorney-General, the day before the same would have been reached, asked that the same be passed for his convenience, because his brief was not ready, and the same was passed, with the understanding that it should be put upon the day-docket for December 4 for argument.

Before that day a motion was filed in the Court of Claims for a new trial, based upon the terms of the second section of the act of June 25, 1868, which provides that "said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court or within two years next after the final disposition of any such suit or claim, may, on motion in behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States."

This motion is not made upon the affidavit of the Attorney-General who was in office at and before the trial in the Court of Claims, nor of the Assistant who prepared and tried the cause, nor of anybody connected with said Attorney-General or Assistant; nor does even the present Attorney-General, who assumed office in June, 1876, make any affidavit, but he merely files his request or motion for such new trial.

The only person who furnishes any affidavit, except persons who were during the time of the trial and still are in Europe, and in no way connected with the Attorney-General's office, is Mr. John J. Key, who states that his connection with and knowledge of the case commenced on July 13, 1876. It would appear that at some time subsequent to July 13, 1876, Mr. Key, under some special arrangement with the Attorney-General, took the documents above mentioned, which were before and at the time of the trial in the Court of Claims in March, 1874, in the possession and under the control of the Government attorney who tried the cause, and which had been resting ever since under the control of the Government and its attorneys, and carried the said evidence to Europe, and there proceeded to newly discover the same.

The affidavit of Mr. Key is exactly described by the Court of Claims in *Silvey's case*, 7 *Nott & Huntington R.*, *p.* 305:

"The affidavit establishes nothing more than that a lawyer having nothing to do with a case on its trial, then knew nothing about the evidence relating to it, (which is an ignorance probably shared by every lawyer in the world, except the few employed on the trial or in some way connected with the case,) and that this lawyer has found some evidence which for some reason or other unknown to him was not produced when the case was tried."

On January 8, 1877, the Court of Claims, after full ar-

gument, entered an order granting a new trial. (Nott, J., dissenting, and Peck, J., not sitting.)

Upon January 22, 1877, the appellee herein filed his petition in this court for a writ of *certiorari* to review such action of the Court of Claims.

To assist us in the considerations we shall offer upon the subject we are fortunately not without ample and direct precedent, both in respect of the action of the Court of Claims and the method of reviewing the same.

That learned court has had before it for determination two cases substantially parallel with the one at bar, and no court has ever treated any subject with more vigor and clearness. The two cases of *Child, Pratt & Fox*, 6 *Nott & Huntington R.*, 49, and *Silvey*, 7 *Ibid*, 306, are leading cases upon the subject, and terse and vigorous denunciations of levity in the disturbance of the rights of judgment creditors.

The circumstances of each of these cases are so similar to the one at bar that it would be difficult for the ordinary mind to distinguish between them. Probably the only distinguishable difference is, that in the present case it appears affirmatively and without challenge that the "*new*" case was well-known to the Government counsel at and before the trial, and the question of its introduction or non-introduction was subject of consideration and deliberation with such counsel at that time.

We quote from the opinion of the Court of Claims, as delivered by Chief-Justice Drake, in the case of *Child, Pratt & Fox*, such opinion fully and ably demonstrating that the court was "*without authority*" to award a new trial to the defendants on the ground of injustice, because at the trial their counsel held back evidence which was equally within their knowledge and their power to produce.

The Chief-Justice proceeds:

"The fact, then, that the defendants' counsel did not on the trial of that case hold the law to be as the Supreme Court afterwards pronounced it, and therefore omitted to make the proof now sought to be let in, though they knew the facts as well then as they know them now, does not warrant the granting of a new trial. It is, however, insisted for the defendants that this is a case coming within the remedial purview of the second section of the act of 25th June, 1868, 'to provide for appeals from the Court of Claims, and for other purposes,' which is in the following words: 'That said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion in behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States.'

"It is not assumed by the counsel for the defendants that any fraud was practised upon the Government by the claimants in obtaining judgment in this case, nor that any wrong has been done by them therein, aside from such as may result from error in the judgment in the merits of the case. Whether there was wrong of that description is the very question to be decided by the Supreme Court in the appeal, and it is not now an open question here. We await the judgment of that court on that point.

"But it is claimed that injustice, within the intent and meaning of that section, has been done to the defendants, and that this court is authorized, if not required, for that reason to grant a new trial.

"This point, like the others, is connected with the evidence proposed to be introduced to prove the fact of a voluntary submission. Though, as we have shown, that evidence, so far as presented here, would be sufficient to establish that fact, yet we will consider it, and what do we find? *Simply that the alleged injustice results solely from the omission of defendants' counsel to offer at the trial the very evidence now sought to be introduced,*

though it was as well known to the defendants and their counsel then as now; was then, as now, in their possession, and could as well then have been introduced, as it could now be on a new trial. If its non-introduction at the trial was an injustice to the defendants, it was inflicted by their own officers, and not in any measure by the claimants. We know of no law which would allow a party thus to take advantage of his own laches. The simple design of this section, as it appears to us, is *to protect the Government against unconscionable advantages gained over it without laches or mistake on the part of its officers, not to give it unconscionable advantages over claimants through such laches or mistake.*

"It is easier to say what is not than what is injustice within the meaning of this section. It is necessarily a case of first impression, upon which we can derive little light from the common law. But after as careful reflection as we could bestow the following are our views so far as this case requires their expression:

"There may be injustice to the United States in a judgment which would by the appellate court be found erroneous; but that does not seem to us to be the description of injustice meant by this section, for the following reasons: 1, because an appeal is provided by law as the means of rectifying such error; 2, because the motion for a new trial is, by this section, allowed to the Government after the case has been removed to the Supreme Court by appeal, as well as before, when, if it had been intended to perform the office of a *quasi* writ of error *coram nobis*, it should by all rules precede the appeal in every case; and, 3, because this section provides that the motion is to be granted *upon evidence;* which evidence must reasonably satisfy this court that fraud, wrong, or injustice has been done to the United States. *This requirement of evidence in support of the motion seems to us necessarily to imply evidence that was not before the court at the trial;* for, if it had been there, it is not supposable that the counsel for the Government would have failed to direct attention to it, or that the court would, without passing directly upon its weight and effect, have rendered a judgment against the Government.

"If these views be correct, then it is clear to us that two conclusions follow:

"1, that the injustice contemplated by this section is not that which results from mere judicial error, which the Supreme Court may rectify on appeal; and, 2, *that it must be such injustice as was discovered after the rendition of the judgment.*

"*We do not, therefore, see in this section any authority, much less requirement, to award a new trial to the defendants on the ground of injustice, because at the trial their counsel held back evidence which was equally within their knowledge and their power to produce.*"

Child, Pratt & Fox vs. *The United States, On motion*, 6 *N. & H. Ct. Claims Rep., pp.* 49, 50, 51, 52 *&* 53.

Here the issue was sharply made and clearly decided, the court holding that it was *without authority* to grant a new trial in precisely such a case as the one at bar.

Therefore, in arguing that the Court of Claims could not grant a new trial in this cause we only repeat its own declarations, made deliberately, unanimously, and after full argument. An examination of the opinion first cited will show that it received unusual care, and was the result of mature investigation.

Subsequently this statute came again under the consideration of the Court of Claims in the case of *John Silvey*, 7 *Nott & Hunt.*, 305. That case, in the opinion of some of the judges, differed from the preceding one of *Child, Pratt and Fox* in that the facts which were the basis of the motion were not shown to have been within the knowledge of the law officers who tried the cause, but it was clearly shown that they could have been known by the exercise of the most ordinary diligence. The majority of the court, however, viewed the case as being controlled by the former decision. The whole ground was again gone over, and it was supposed that the construction of the statute was finally settled.

The opinion of the court upon denying the motion could well be adopted as our argument in the present case.

Nott, J., delivered the opinion of the court:

"He who obtains a judgment in a court of law acquires property, which may be bought and sold, which the law regards as the highest evidence of debt, and which cannot be taken away from him through evidence newly discovered, unless the motion be in furtherance of justice, and the evidence appear as conclusive as that through which the judgment was obtained. The granting of a new trial on newly-discovered evidence is, in one sense, discretionary with the court that awarded the judgment, for it is not the subject of judicial review. But to guard against the suspicions and prejudices of judges seizing upon trivial pretexts for the setting aside of judgments; to prevent the exercise of this irresponsible judicial power from degenerating into judicial abuse; to exact from litigants good faith and full endeavor when passing through the ordeal of a trial, and to carry into effect a salutary principle of public policy, that there must be an end of litigation even though injustice to individuals be done, all courts of the common law have united in restricting this administration of justice within a certain clear, fixed, and unvarying rule. And in no place has this exceptional power to destroy the finality of judgments been more clearly restricted or more guardedly exercised than in the Federal courts. The legal principles which govern the granting of new trials on newly-discovered evidence are neither new, unsettled, nor obscure. None are more clearly defined, more certainly established, or more familiar to the lawyer's mind. In the language of a standard text-book: 'To obtain a new trial on this ground, certain well-defined prerequisites are indispensable. The conditions, indeed, are so clear and well settled that courts scarcely ever need to doubt or hesitate as to their application. They are founded on solid reasons of utility as well as justice, and are so simple as to be easily understood and remembered by the practitioner. They are to be found differently stated in the books of reports—the same always in substance.' (Graham & Waterman, 3, 1021.)

"The law of new trials in this court was supposed to have been settled by the decision of all the judges in the cases of *Child, Pratt and Fox*, (6 C. Cls. R., p. 44,) and *Deeson*, (*id.*, p. 227,) yet since this motion has been made, notwithstanding those decisions, it may be advisable to restate briefly the law that is understood to prevail.

"*The Court of Claims act*, (10 Stat. L., p. 612, § 9,) establishing this court, also established as the law of new trials therein the '*rules*' which at '*common law or chancery in suits between individuals would furnish sufficient ground for granting a new trial;*' a provision of which this court said, at the last term, in the opinion read by the Chief-Justice and concurred in by all the judges: '*We consider that this section applies to cases in this court under its present organization, as well as under its original constitution under that act, and precludes our granting a new trial to claimants in any case where, by the rules of common law or chancery, it would not be granted.*' (*Deeson's case.*)

"*By the Amended Court of Claims act*, (12 Stat. L., p. 765, § 7,) reconstituting this court, it was provided that '*any final judgment rendered against the claimant on any claim prosecuted as aforesaid shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy,*' a provision which we have held was not '*intended to do more than attach to the final judgments of this court the conclusiveness which the common law ascribes to the final judgments of all courts of competent jurisdiction.*' (*Spicer's Case*, 4 *C. Cls. R., p.* 34.)

"In 1867 this court recognized as the law of the court the well-established common-law '*rule by which the granting of new trials is regulated,*' and held the moving party to the strictest diligence, (*Garrison's Case*, 2 C. Cls. R., p. 389,) a decision which all the judges subsequently held to apply as well to the Government as to the individual, and of which, as against the Government, it was said: '*We adhere to the rule we have heretofore laid down, that a new trial will not be granted where, by the use of due diligence, the evidence relied upon as a ground therefor might have been discovered in time to be produced at the trial.*'

(Per Drake, Ch. J.: *Child, Pratt & Fox Case*, 6 *C. Cls. R.*, *p.* 49.

"Such being the law, as established by statute and declared by this court in 1867, it could only be changed by the reversal of the Supreme Court or the enactment of Congress. It was, of course, within the power of Congress to sweep away the common-law rule entirely, or to change it; and in 1868 Congress did enact an alteration.

"The common-law rule is too well known and too certainly fixed to need investigation, being almost universally enunciated in the same terms by the English, Federal, and State courts.

"It is enough to say that it imposes on the moving party these conditions:

"1. That the evidence has come to his knowledge since the trial.

"2. That it was not owing to the want of due diligence that it did not come sooner.

"3. That it is so material that it would probably produce a different verdict if the new trial were granted.

"4. That it is not cumulative.

"5. To which is added, 'a new trial will not be granted if the only object of the newly-discovered evidence is to impeach the character or credit of a witness.' (3 Graham & Waterman, p. 1021.)

"The act 25th June, 1868, (15 Stat. L., p. 75, § 2,) provides: 'That said Court of Claims, *at* any time while any suit or claim is pending before, or on appeal from, said court, or within two years next after the final disposition of any suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, *upon* such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States.' By this the act modifies the rule of the common law, and abrogates some of its conditions.

"1st. It gives to one party an advantage not common to the other.

"2d. It enlarges the time within which a motion may be made by the favored party; and lest the maxim, *nullum*

tempus occurit regi, should be strained to make the time interminable, the act reduces it to a fixed period.

"3d. It allows the motion to be made on behalf of the favored party; even though this court has lost jurisdiction of the action—a provision which the Supreme Court has characterized as an anomaly, but to which it has given effect. (*Ayer's case*, 9 *Wall., p.* 608.)

"4th. It authorizes the motion to be founded upon evidence which '*may be cumulative*,' an alteration which clearly refers to the rule of the common law, and recognizes and affirms—if recognition and affirmation be necessary—the existence of that rule in the practice of this court.

"Therefore, as to those particulars which were not by Congress abrogated, the rule received from Congress a legislative sanction. Congress, by enacting an exception to the rule, confirmed the rule. *Exceptio probat regulam.*

"Finally, the act of 1868 has already received a judicial construction eminently applicable to this case. In general terms, decisive, unambiguous, unmistakable; the Chief-Justice said, and all the judges of the court concurred: '*The simple design of this section, as it appears to us, is to protect the Government against unconscionable advantages gained over it, without laches or mistake on the part of its officers; not to give it unconscionable advantages over claimants through such laches or mistake.*' (*Child, Pratt, and Fox case*, 6 *C. C'ls. R., p.* 52.)

"And of this decision the leading counsel of the Government on a similar motion in another case has said that '*no man could quarrel with it;*' and of the statute, that '*most assuredly it does nothing but change the common law in two particulars, the time within which the motion may be made, and the cumulative evidence on which it may be founded.*'

"Therefore it is not open to inquiry in this court whether the Government, like other suitors, is or is not bound to due diligence.

* * * * * *

"When we come to the facts on which this motion is made we find that the defendants have not complied with one single condition of the law, (save the time within which such motions may be made,) nor presented a reason for a new trial entitled to consideration.

"1st. *The moving affidavit is made by an assistant counsel of the Attorney-General, retained in the case long subsequent to the former trial, and in no way connected with the former defence.* The affidavit implies nothing more than that the new evidence has come to the knowledge of this counsel since the former trial, but when, how, or amid what circumstances it was discovered does not appear, as is required by the law. (*Palmer* vs. *Fish*, 2 Curtis C. R., p. 14.) *The affidavit establishes nothing more than that a lawyer having nothing to do with a case on its trial, then knew nothing about the evidence relating to it, (which is an ignorance probably shared by every lawyer in the world, except the few employed on the trial or in some way connected with the case,) and that this lawyer has found some evidence which for some reason or other unknown to him was not produced when the case was tried.*

"2. *Neither the vigilance nor diligence of the former law officers of the Government previously charged with the defence of the action is shown; nor can the testimony now sought to be introduced be regarded as newly-discovered evidence.* * * * *

"*The motion rests exclusively upon the affidavit of counsel who knew nothing about the case when it was tried, and who still knows nothing about the knowledge and views of his predecessors when they tried it.* It is not newly-discovered evidence which supports the motion, but an excuse for a new trial, which appeals only to the suspicions of the court. Courts cannot grant new trials upon suspicion, *nor are they invested with an immeasurable discretion that will enable them to destroy the finality of judgments on their mere pleasure.*"

Chief-Justice Drake, who had delivered the opinion of the court in the case of *Child, Pratt & Fox*, dissented in this case, because he did not regard the merits of the motion as presenting the same issue. He, however, distinctly reiterated the position assumed in that case in the following words:

"We there held two points:

to judicial proceedings, but related to the action of a commission appointed to aid Congress in its duties. This so-called court had no terms; it rendered no judgments, but by the statute might reconsider a claim once decided adversely, and transmitted to Congress after the decision had then been affirmed, upon such reasons being presented as by the rules of common law or chancery in suits between individuals would furnish sufficient grounds for a new trial.

In process of time radical changes were made in the organization of this body. It ceased to make reports to Congress; it had regular terms fixed by law; it rendered judgments, provided for the publication of its opinions, and became a court *in fact* as well as in name. This provision of section nine of the original act thereby became wholly obsolete. It remained unrepealed until the recent revision of the Statutes, and is there found in section 1087 slightly modified, and in these words: "When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial."

This is merely declaratory of the common law.

Accordingly, the Court of Claims, when it became a part of our judicial system, had in the matter of new trials the same power, with the same limitations, as all other courts of the country.

From the time the court was reorganized, in 1863, until the year 1868, there was no express enactment authorizing the court to grant a new trial on behalf of the United States; but the power of the court to have allowed such motions cannot possibly be doubted.

No claimant moving for a new trial would have thought of resting his application upon this ninth section of the act

of 1855. But as the rule it expressed was precisely the rule upon which the court was now required to act, it could be of no consequence whether he invoked the aid of the statute or not.

It follows that from 1863 to 1868 the court held and exercised the power to grant new trials for either party, upon the same principles and subject to the same limitations as all other courts. None of this power has been taken away by statute, but by the act approved June 25, 1868, the power of the court in behalf of the United States was materially enlarged. The common-law power for granting new trials on behalf of the Government remains unimpaired; the statute only extends it in certain respects.

2. The cause having, however, been removed by appeal into the Supreme Court, the power of the court at common law to grant a new trial was spent, and the motion for a new trial could only be entertained under the authority of the statute.

The statute of June 25, 1868, confers upon the Court of Claims a limited power entirely apart from its general jurisdiction, and it is by virtue of this special statutory provision alone that the court can grant a new trial when a case has ever passed beyond its jurisdiction and into the jurisdiction of this court by appeal.

At common law, when a case is once taken by writ of error to another court the record is removed from the former, and all further jurisdiction of the case is gone. The court would have no more power to grant a new trial and regain jurisdiction than if the judge were a private citizen.

Powell on Appellate Proceedings, (1872,) *p.* 113, 2 *cases cited.*

Hilliard on New Trials, p. 587, § 8.

Whereas by the statute referred to the power to grant a new trial is given not only after judgment in the Court of Claims while the case is still before it, but after removal from its jurisdiction by appeal to the Supreme Court, and even after a final disposition of the cause there.

See remarks of Drake, J., *U. S.* vs. *Silvey, supra.*

In the first case in which the statute came before this court Mr. Justice Nelson in a brief opinion stated that the act was *anomalous;* that it gave the Government a considerable advantage in litigation, but that the power of Congress to pass such an act could not be doubted.

See to the same effect, *Ex parte Russell*, 13 *Wall.*, 664.

The Court of Claims, speaking of the power thus conferred by the statute to grant a new trial, calls it as special a jurisdiction as though it had been vested in a separate court.

Per Loring, J.: *United States* vs. *Silvey*, 7 *N. & H.*, 327.

For any effectual action thereupon the statute must necessarily be adhered to and complied with in all its terms and conditions by the defendants in making the motion, and by the court in acting thereon.

3. The nature of the power conferred by the statute is limited and restricted.

The changes made by the statute are—

a. The time in which a new trial can be granted is extended so as to reach two years beyond the final disposition of the cause.

b. The appeal of the cause and its removal into this court shall no longer bar the motion.

c. The application must be based upon evidence sufficient to satisfy the court, although it may be cumulative.

d. The only cause to be assigned for this novel procedure must be that fraud, wrong, or injustice has been done to the United States.

With the first and second of these exceptions we have nothing to do. It is upon the third and fourth that the issues in this case arise.

There are many grounds for a new trial at common law other than those involving fraud, wrong, or injustice. Therefore, so far as the grounds of the new trial under this statute are concerned, they are much narrower than the common-law rules, and well they should be. If a judgment of three years' standing is to be disturbed, it ought to be done only on as weighty grounds as fraud, wrong, or injustice. Applying within the brief time ordinarily allowed for such a motion, the applicant might show the court that it had erred in its rulings. In fact, this is the most common ground upon which to ask for new trials.

It could not for a moment be argued that this statute, which requires the court to be satisfied by evidence that fraud, wrong, or injustice has been done to the defendant, would permit the court below to grant a new trial after an appeal to this court, because that court could be convinced of its error.

We cite this to show that something different from the ordinary common-law grounds are intended by this statute. It does not follow because the time is extended that all of the grounds of action remain the same. The defendant cannot claim the benefit of one part of the statute and ignore the requirements and restrictions of the other parts.

If he waits three years, and until the case is ready for hearing upon appeal in this court, he cannot then appeal to the general discretionary power of the court over its

own decisions and judgments. *Coming in under the statute, he must bring his case clearly within its terms.*

He must, *by evidence*, satisfy the court that fraud, wrong, or injustice has been done to the United States. Upon this ground alone has the statute given to the court the power to grant a new trial, and it must act upon that ground or it cannot act at all. This goes to the very jurisdiction, power, and authority of the court.

4. The statute requires, as a condition precedent to the granting of a new trial, the production of *evidence* by the Government, and such evidence must be *newly discovered*, and must show fraud practised *by the claimant* upon the Government.

Without such evidence the Court of Claims cannot be "reasonably satisfied that fraud, wrong, or injustice in the premises has been done to the United States," and the court being thus reasonably satisfied *upon evidence* is *a fact* upon which their jurisdiction and authority to grant a new trial depends.

It is required by the statute that, before granting a new trial, *evidence* shall be produced, and such as shall *reasonably satisfy* the court of certain facts.

Those facts are that fraud, wrong, or injustice in the premises has been done to the United States.

What the nature of this evidence must be for which the statute calls is shown by the construction given to the statute by this court in *ex parte Russell*, 13 *Wallace*, 664, where the power given by this statute to the Court of Claims is decided to be analogous to the power of a court of chancery to grant *a bill of review, or a bill to impeach a decree for fraud.*

In considering the various points that arose in that case,

Mr. Justice Bradley, who delivered the opinion of the court, said:

"The difficulty has arisen out of the anomalous provisions of the 2d section of the act of June 25, 1868.

"The policy of this act was undoubtedly dictated by the fact that the Government agents are at a great disadvantage in defending suits in the Court of Claims on account of their personal ignorance of the facts and of the witnesses and evidence necessary to rebut the petitioner's case; for all which they have to depend on distant and uninterested parties, or parties whose sympathies and perhaps whose interests are with the claimants, whilst the claimants have had years to prepare and get up their cases, and to select the most favorable proofs to sustain them. From these causes no doubt the Government is often greatly defrauded, and claims are proved and adjudged against it which have really no just grounds, or which have long since been settled and paid. But whatever reason Congress may have had for passing the act, of its right to pass it there is no question. The erection of the Court of Claims itself and the giving to parties the privilege of suing the Government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit.

"The section in question was undoubtedly intended to give the Government an advantage, which in respect to its form is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to confer. It authorizes the Court of Claims on behalf of the United States, at any time while a suit is pending before or on appeal from said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the court that the Government has been defrauded or wronged. * * *

"It has been objected that the granting of a new trial after a decision by this court is in effect an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. *A new case must be made;* a case involving *fraud or other*

wrong practised upon the Government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud."

Here we have the rules of construction applied to the statute which must control. First, the court considers the mischief to be remedied, which is the great disadvantage the Government agents are at in defending suits, on account of their personal ignorance of the facts and of the witnesses and evidence necessary to rebut the petitioner's case. The opinion then proceeds to give such effect to the act as will remedy evils of this character, and it says the act authorizes the court to grant a new trial upon such evidence as shall satisfy it that the Government has been defrauded or wronged.

It had been suggested that to allow the court below to control and vacate its judgments for any reason which seemed to it sufficient, might, if pushed to all its logical consequences, permit that court to vacate a judgment which had been affirmed here.

That objection was well answered by stating that *a new case* must always be made; a case *involving fraud, wrong, or injustice practised on the Government.* And further, that it was analogous to the case of *a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.* That is to say, the fraud, wrong, or injustice required by the statute to be proved to the satisfaction of the Court of Claims are the same that must be shown to a court of chancery before it can grant relief upon one of these bills.

The grounds upon which alone such relief can be allowed are too well settled for argument.

1st. Upon material evidence, not of any and every kind, but *newly discovered, i. e.*, which has come to the knowledge of the party too late to have been used upon the original hearing of the cause; and,

2d. For fraud or injustice in obtaining the decree, and the fraud or injustice must be *upon the part of the complainant.*

The statement of the law in *Daniells' Ch. Pr., vol. III, pp.* 1576–1578 is—

"A bill of this character can only be brought upon error in law appearing on the face of the decree without further examination of matters of fact, or upon some new matter *which has been discovered after the decree, and could not possibly have been used when the decree was made.*" (*Perkins' edit., p.* 1630.)

"Upon the application the court must be satisfied that the new matter has come to the knowledge of the applicant or his agents for the first time since the period at which he could have made use of it in the suit, and that it could not with reasonable diligence have been discovered sooner."

Again, vol. III, p. 1733, (*Perkins' edit., vol.* 2, *p.* 1638:)

"The new matter upon which such a bill is necessary must have come materially and substantially to the knowledge of the party or his agents after the decree, or at least after the time when it could have been advantageously introduced in the former cause, and the new matter not only must not have come to the knowledge of the party, but it must be shown that the party could not with reasonable diligence have acquired a knowledge of it before the time when publication passed."

Story says, (*Equity Pleadings*, §§ 413, 414:)

"The new matter must have first come to the knowledge of the party after the time when it could have been used in the cause at the original hearing. Lord Bacon's Ordinance says in one part it must be 'after the decree,' but that seems corrected by the subsequent words, 'and could not possibly have been used at the time when the decree passed,' which words point to the period of the publication of the testimony. And, accordingly, it is now the established exposition of the ordinance that the new matter shall

not have been discovered until after publication has passed.

"In the next place another qualification of the rule, quite as important and instructive, is that the matter must not only be new, but it must be such as the party, by the use of reasonable diligence, could not have known, for if there be any laches or negligence in this respect that destroys the title to the relief."

Smith's Ch. Pr., vol. 2, *p.* 48.
Dexter vs. *Arnold*, 5 *Mason, pp.* 512, 303.
Ord vs. *Noel*, 6 *Madd., p.* 127.
Wiser vs. *Blackly*, 2 *John. Ch., p.* 488.
Livingston vs. *Hubbs*, 3 *John's Ch.*, 124.
Patterson vs. *Slaughter*, *Amb'l*, *p.* 293.

The settled law upon this subject is well stated by the present Chancellor, Lord Cairns, in *Patch* vs. *Ward*, *L. R.*, 3 *Ch. App.*, 206:

"The bill in this cause is filed to set aside a decree absolute. Being a decree signed and enrolled, the matter covered by it has become solemnly *res judicata* between the parties to the suit, and the decree must remain, unless it can be set aside either upon the ground of error apparent upon the face of it, upon the ground of *new matter subsequently discovered, or upon the ground of fraud.* If it is to be impugned for error apparent upon the face of it, or for new matter relevant to the issues in the cause, that must be done by bill of review, the bill in the former case being filed without any leave of the court; in the latter not without leave, and in order to obtain that leave the applicant must satisfy the court that the new matter is relevant to the issues, *and could not with reasonable diligence have been earlier discovered.* There is no error apparent upon the face of the decree, neither has any leave been applied for or obtained to file a bill of review upon the ground of new matter discovered. The third ground alone remains, and it is that upon which the bill is filed, that the decree was obtained by fraud.

"Now, it is necessary to bear in mind what is meant

and what must be meant by fraud when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle upon which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, *The Duchess of Kingston's case*, where the judges, being consulted by the House of Lords, replied to one of the questions, 'Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.' The fraud there spoken of must clearly, as it seems to me, be *actual fraud*, such that there is on the part of the person chargeable with it, the *malus animus*, the *mala mens*, putting itself in motion and *acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him.*"

Sir John Rolt, C. J., in the same case, says:

"The plaintiff can come to be relieved from an order absolute only on the ground of its having been obtained by fraud. I think, for the reasons which have been given by my learned brother, that the fraud must be actual, positive fraud, *a meditated and intentional contrivance* to keep the parties and the court in ignorance of the real facts of the case, and obtaining the decree by that contrivance. Mere constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead without any such intention or contrivance, would probably not be sufficient—at all events, I think, could not, after such delay as has occurred in this case, be deemed sufficient—to set aside the order which has been made. *What, therefore, the appellee has to do is to satisfy the court that the decree was obtained by the positive and actual fraud and contrivance of the party obtaining it.*"

The more the spirit and true intent of this statute is inquired into the more evident it becomes that its operation must be limited to *a new case made* which shows fraud, wrong, or injustice practised upon the Government *by the*

claimant, and this was the settled construction given to it in the Court of Claims until the new trial was granted in this cause, when all their carefully considered and deliberately established precedents were precipitately abandoned without a word of explanation.

If this construction of the statute by this court and the Court of Claims is correct, and if it is analogous to a bill in chancery to set aside a decree, or to impeach a decree for fraud, the nature of the evidence upon which alone the Court of Claims is authorized to grant the motion must be newly discovered, and must tend to show fraud practised upon the United States by the claimant. If, then, there was no such evidence presented to the Court of Claims, it is clear that one of the jurisdictional facts upon which its power to entertain the motion at all depended was wanting.

The jurisdiction of the Court of Claims depended *upon a fact to be proved before itself*, and that fact was that fraud, wrong, or injustice had been done to the United States, of which the statute requires reasonable proof before a new trial can be granted.

But these words have a definite and well-settled legal meaning, and unless evidence is produced which, *if uncontradicted*, establishes such fraud, wrong, or injustice, *in the sense in which these words are used*, there can be no compliance with the statute.

The cause had been removed from the jurisdiction of the Court of Claims, and was in the Supreme Court awaiting a final disposition, when the Court of Claims attempted to oust the jurisdiction of the Supreme Court and reassume its own lost jurisdiction by granting a new trial.

It will be admitted that this could not be done arbitrarily. It could not even be done in the exercise of a sound discretion.

The power was limited to cases within the words of the statute, and these require that the court must be *reasonably satisfied upon evidence* that fraud, wrong, or injustice has been done. This is impossible unless some evidence is offered.

The only competent evidence would be that which was newly discovered, or tended to show fraud or wrong by the claimant. The facts show that none such was produced. (See 5, *infra.*)

If the court had granted a new trial upon motion of the Government without hearing any evidence at all, they would have acted in the premises without jurisdiction, because the statute requires them to be reasonably satisfied upon evidence, and there being no evidence one requirement of the statute necessary to give jurisdiction would be wanting. But if the true construction of the word evidence as used in the statute is newly-discovered evidence—evidence showing a new case made—then, if no such was offered, the result is the same as if the court had acted without evidence at all.

If the statute meant that *any* evidence would answer by which the court was reasonably satisfied, still *some* would have to be offered to comply with its terms.

Precisely in the same way, if the statute means that evidence of a nature to show a new case must be produced before the Court of Claims can be reasonably satisfied, then, if, as the facts show, there was none, a requirement of the statute is wanting, and in its absence the action of the court was without jurisdiction, and void. The Court of Claims was (to use the language of Chief-Justice Drake) "*without authority.*"

A statute of this same nature conferring power upon a court to open a decree which had been settled, in language very similar to that used in the present case, has been before the courts of New Jersey for construction.

The language of the judges there show how strict must be the compliance with the true intent of such a statute, and that nothing is left to the discretion of the court in acting or not acting upon the proof laid before them.

The act of Congress declares that the Court of Claims can grant a new trial—that is, open a judgment—upon such evidence (though the same be cumulative or other) *as shall reasonably satisfy said court that fraud, or wrong, or injustice* in the premises has been done to the United States.

In New Jersey the statute provides: "The sentence or decree of the orphans' court shall be conclusive upon all parties, * * * except when *fraud or mistake* can be shown *to the satisfaction* of the orphans' court."

This statute has been often before the courts of that State.

In Johnson vs. *Eicke*, (7 *Halst.*, 316,) the orphans' court decreed accounts to be opened, "*because they were satisfied* that there was an apparent mistake."

The whole evidence laid before the court consisted of written documents, which were removed by *certiorari* to the Supreme Court, and on the face of them there was no mistake. *Held*, that the court will reverse the decree. That the true meaning of the words "to the satisfaction of the said orphans' court" is not to enable that court to dispense with proof, but to indicate to them that the proof should be clear and satisfactory, and that they ought not in a doubtful case to open an account.

Drake, J., says:

"It is objected, in the next place, that this was merely the exercise of a *discretionary* power in the orphans' court, and that therefore error will not lie. It is no doubt a general rule with respect to the proceedings of common-law courts that error will not lie in a matter resting in discretion, and there are many of their proceedings which are

decided to be of this character, and among others the opening of judgments.

"*But the present is not an analagous case.* The power to open a settlement is given by an act which does not confer *a general discretion* on the subject, but limits it to cases where the party applying for an opening of a settlement shall prove some *fraud* or *mistake* therein. It is added, 'to *the satisfaction* of the said orphans' court.'

"But surely this latter expression is not to be construed as so operating on what precedes it as to vest an unlimited discretion. When an authority is granted to be exercised only under certain specified circumstances, the court or the individual thus empowered cannot dispense with the existence of such circumstances. If the orphans' court is authorized to open a settlement *upon proof of fraud or mistake*, not only is the power conferred by the act confined by its terms, but the exercise of any power as a court beyond those limits is thereby indirectly denied."

The same statute came again under consideration in *Crombie* vs. *Engle*, (4 *Harris, N. J.*, 82.) Hornblower, C. J., cites, with approval, the above language of the court that the words "to *the satisfaction* of the orphans' court" ought not to be construed as vesting "*an unlimited discretion*" in the court to act as they please, and continues: "To that remark I will only add that the words 'to the satisfaction of the court' *are in fact superfluous and unmeaning, or rather they mean no more than would have been implied and understood if they had been omitted.*"

When a statute says a court shall do a certain thing "upon proof being made," it means *sufficient* proof, such as satisfies the court of the existence of the fact alleged.

Suppose, then, the statute had said, "The court shall open the account whenever the party applying *shall prove* fraud or mistake therein," would it be pretended that the orphans' court were to be the sole and exclusive judges of what amounted to such proof, *and that their decision could not be reviewed in this court? I think not.*

"The only difference between that case (*i. e.*, the one above, 7 *Halst.*, 316) and the one now before us is that in the former the orphans' court were *satisfied* when they ought not to have been; and in this case they *were not satisfied* when they ought to have been; and surely it will not be pretended that when the orphans' court open and alter an account upon what we think *insufficient proof* we may review their order, but that when that court refuses to open an account upon most clear and abundant *proof* of fraud and mistake we have no power to review their proceedings and correct the error."

Accordingly the Chief-Justice holds that the provision of the statute, that the decree shall be final and conclusive, "except where fraud or mistake can be shown to the satisfaction of the court," does not refer the matter to the mere discretion of the court, but is equivalent to a positive enactment that the account shall not be conclusive if fraud or mistake can be shown by *legal* and *sufficient* evidence.

If the court refuse to open the decree, notwithstanding that fraud or mistake is proved by *legal evidence*, it is error, and a *certiorari* will lie. These cases confirmed *Stevenson* vs. *Phillips*, (1 *Zab.*, 70,) where the court set aside an order of the orphan court opening a decree without *proper* proof of fraud or mistake. The court went on the ground that the "mistake" as used in the statute must be one of fact or law, not a mere error in the judgment of the court on a point resting in their discretion, (*p.* 72,) while the evidence only showed a mistake of the latter kind in the decree which it was sought to open. Here, then, we find a statute allowing a court to open a decree when *fraud* or *mistake* can be shown *to the satisfaction* of the court.

In the case first cited, the orphans' court declared that it was satisfied of *mistake*, but the supreme court, upon the

proof being laid before it, said that it showed upon its face that there was *no mistake*, and quashed the order.

In the second case cited the orphans' court were satisfied there was no mistake, but the supreme court said the evidence produced legally established mistake, and the order was again set aside.

In the third case cited there was evidence produced showing an error in the decree which it was proposed to set aside, but it was merely an error in the judgment of the court on a point resting in their discretion.

On this evidence, the orphans' court, being satisfied of mistake, opened the decree.

The supreme court construed the meaning of the statute differently, and said that the "mistake," as used in the statute, was one of fact or law, and there being no evidence to show a mistake of this kind the order of the court was quashed.

Finally, we find the judges in all the cases holding that the fact that the court can open the decree upon being satisfied of fraud or mistake does not give them an unlimited discretion, or enable them to dispense with legal proof by declaring that they are so satisfied, the words to the satisfaction of the court, according to Chief-Justice Hornblower, being in fact superfluous and unmeaning, and not doing away with the need of sufficient proof.

There must be evidence which, if true, proves that a state of facts exists which the statute declares a prerequisite to setting aside the decree. If this fact is mistake, such mistake, in the sense in which the statute uses the word, must be proved. It is not enough that the court misinterpret the statute and *think* it has been proved.

The case of *Silvey* vs. *U. S.*, 7 *Ct. Cl.*, 305, illustrates the same point as applied to the statute of Congress.

The judges there took opposite views of the true nature of the evidence required by the statute.

Drake, Chief-Justice, states his view of the law of the case, and concludes: "In my judgment the evidence makes a *prima facie* case which 'reasonably satisfies' me that 'wrong and injustice,' if not fraud, 'have been done in the premises to the United States,' and that a new trial ought, therefore, to be granted."

It is clear that the evidence satisfied him, because it proved what in his opinion the statute meant by the words fraud, wrong, or injustice. That is, he settled the legal meaning of the words so used, and the evidence proved that meaning to his reasonable satisfaction. But suppose that he mistook the law, and that the wrong and injustice, which in his opinion was reasonably established, was not the wrong and injustice really intended by the statute, just as above the mistake proved in the decree in the orphans' court was not the kind of mistake to which the statute referred, would not such a mistake of law be subject to review in the Supreme Court?

In *Crombie* vs. *Engle*, 4 *Harris*, (*N. J.*,) *p.* 80, in which just the opposite was the case, when the court above thought the evidence of fraud and mistake was legal and clearly sufficient to establish the one or the other, but the lower court had refused to open the decree, Hornblower, C.-J., said:

"We must intend not that the court below refused to be satisfied with legal and sufficient evidence, but that they erred in supposing the evidence to be illegal and insufficient, or that what was insisted on as fraudulent or an error in the account was not so in law."

So in the case at bar, if this court is satisfied that no evidence was produced of a nature *sufficient* to establish "fraud, wrong, or injustice" required by the statute, they will intend that the court below erred in their view of the

proper meaning of these words, and misunderstood the statute under which they professed to act.

In *Houghton* vs. *Slack*, 10 *Vt.*, 523, a statute provided that a new trial could be granted after judgment by default if the default were occasioned by "fraud, accident, or, mistake."

The statute provided that the method of proceeding should be by petition, thus dispensing with a formal writ of error, or a *certiorari* when that was the proper writ.

The court says:

"A petition for a new trial is an appeal to the discretion of the court, and in the exercise of this discretion they are supreme *so long as they keep within the limits of their authority*. Their proceedings, when of this nature, are not subject to be revised or controlled by writ of error, *certiorari*, or appeal. *If, indeed*, they transcend those limits, *and attempt to exercise a discretionary power* which they do not possess, *their decision may be set aside for that reason*. If, therefore, they grant a new trial, their decision upon the merits is not subject to a revision; yet if they grant a new trial in a case where they had no legal authority to do it, it is error."

In U. S. vs. Silvey, 7 *Ct. of Cl.*, 334, Loring, J., says:

"Under the provisions of the statute it is certain that where, on the hearing of a motion for a new trial, we are satisfied of the fraud, we cannot refuse a new trial, because that would be to defeat the statute.

"And for precisely the same reason we cannot reject any evidence *which, from its legal quality, is competent and efficient to prove the fraud*. Where a statute makes it the duty of a court to find a fact '*on evidence*' it makes it its duty to receive any *legal* evidence competent to prove the fact. In the case of the *U. S.* vs. *Crusell*, appealed from here and decided at the present term of the Supreme Court, they said that whatever the decision of this court might be, under a motion for a new trial under this statute, it could

be reviewed in the Supreme Court. And that would be a necessary consequence of the fact that under this statute *we are not using a discretionary power*, but performing a judicial duty prescribed by statute."

5. No evidence of the nature required by the statute has been produced by the Government.

a. There is no competent allegation that the matter laid before the court is a new case or newly-discovered evidence.

The statute requires the Court of Claims to act upon *evidence*. There is no evidence, no sworn statement of any person, that these facts, or any part of them, are newly discovered.

It is true that the motion, signed by the present Attorney-General in person, states that they are newly discovered. This, however, is a matter of averment or pleading to be substantiated by evidence, not a substitute for evidence.

If it is intended for evidence, it wholly fails of its purpose—first, because it is not sworn to; second, because the person signing it has no knowledge on the subject. If the statement of the Attorney-General were to have the same effect as the affidavit of an ordinary suitor or his attorney, it could not have any greater effect.

A defendant against whom a judgment has been rendered cannot procure a new trial by filing affidavits showing a new defence, and the oath of an attorney or agent then just employed by him to the effect that the testimony is newly discovered. Where the moving party is impersonal, so that his own oath cannot be given, the court will require the affidavit of the person who defended the suit in the first instance. (*Silvey's Case*, 7 *Nott & H.*, *p.* 306.) In this case the court will take judicial notice that the present Attorney-General was not in office when the cause was tried.

His statement concerning a matter essential to the motion, of which he could have no knowledge, cannot be received as evidence to satisfy the court.

If his bare statement of matters concerning which he knows nothing of his own knowledge is evidence enough to satisfy the court on this point, why should it not be sufficient on all other matters raised upon this or any other motion for a new trial?

It is just as essential for the court to be satisfied *by evidence* that these facts have been newly discovered as for it to be satisfied that they exist at all. Why send half over the world to obtain evidence to satisfy the court as to one-half of the case, and ask it to be satisfied with the unsworn statement of an officer who has no knowledge whatever as to the other half? This can only be explained on the hypothesis that the defendant had no evidence whatever to offer on this part of the case. He recognized the necessity of it by making the averment, but as to proof, he has none.

b. It appears affirmatively by claimant's proofs, and unchallenged, that the Government attorneys did know of the matter before and at the time of the trial.

The particular fraud, wrong, or injustice in this case was alleged to consist in the fact that the original claimant, Collie, had adhered to the enemies of the United States by sending into the Confederacy goods contraband of war or other acts, which facts had not been proved on the first trial, and could be proved if a new trial were granted.

These facts, taken alone, if admitted in all their length and breadth, neither show nor tend to show the requirements of the statute, because the Attorney-General, under whose direction this cause was tried, knew them when he went to trial, and in the exercise of his judgment purposely withheld them from motives of policy or prudence.

The knowledge or ignorance of the Government attorney

who tried the cause is the essential element in the case. If he was ignorant of these facts, there might be a question raised depending upon how satisfactory the proof should be made. If he knew of them, there is an end of the alleged fraud, &c.

When a case of fraud is to be made, all the essential elements which go to make up the fraud must be shown. If any one of these is omitted there is necessarily a failure of the whole. The omission here is a total blank as to the knowledge or ignorance of the Attorney-General's office when the cause was tried. It is true this blank was filled by the claimant furnishing uncontradicted proof that the facts were all well known to the law officers. But this was only the difference between the failure of one side to show a *prima facie* case of fraud and affirmative proof by the other side that there was and could be no fraud.

It seems too plain for argument that the Attorny-General for the time being must be permitted to control the litigation of the Government for the time he is in office. The law officers who act under his immediate control and direction act with all the authority he possesses. When these officers apply their judgment in the preparation and trial of a cause their conclusions are as binding as those of any other litigant.

To allege that a new trial can be granted on grounds of fraud, wrong, or injustice, because the deliberate conclusions of the former law-officers, as to which of the facts in their possession should be brought forward on the trial vary from the opinions held by those now in office, would convert the statute to fraudulent purposes.

If the statute should receive this construction, there would be no end of new trials.

We have waited nearly three years upon appeal since the judgment was rendered. If it is now opened for

another trial, and we again succeed, three years more may pass before we can obtain our present position on the calendar.

If the Attorney-General was not bound to present his whole case upon the first trial, he is no more bound to do so on the second trial. What assurance can we have that other facts well known to him may not be withheld because they are not supposed to be of any value, and that his successor will not produce them three years from now, and ask for another trial?

If there is any fraud, wrong, or injustice in this case, it is in the Attorney-General trying the cause with full knowledge of facts which he does not attempt to prove, and three years afterwards demanding a new trial in order to prove the same facts.

The statute was never intended by Congress to permit abuse of this kind; it was only intended to provide a remedy for cases in which some fraud, wrong, or injustice had been practised on the Government. In fact, as well described by the learned Chief-Justice of the Court of Claims, "*to protect the Government against unconscionable advantages gained over it without laches or mistake on the part of its officers, not to give it unconscionable advantages over claimants through such laches or mistakes.*"

The United States does not allow to the respective owners of the fund arising from the sale of captured and abandoned property the interest which is being earned by the Government upon the same, and were the claimant to receive to-day all that can be paid to him under the law, and upon a final determination that the proceeds of the merchandise is and always has been his, such payment would in fact be nothing better for him than *an equal division of his money into two parts.* Two years and nine months have elapsed since the rendition of the judgment in his

favor by this court. *One-sixth of his money* has been lost to him in awaiting necessarily the progress of the cause upon the Supreme Court calendar.

That period became completed, and the cause was appointed for argument in the month of December, when such argument was stayed by the filing of this motion.

The very granting of the motion is equivalent to judgment absolute for the Government for another one-sixth of the claim, notwithstanding there might be no defence offered upon the new trial beyond the scope of the original record.

Indeed, the Government have *already* obtained some *good degree of success.* The several months of delay in the argument before the Supreme Court has been a pecuniary gain to them and a corresponding loss to the claimants, for which they are absolutely remediless.

If, then, the application for the new trial is as lacking in merit as we deem it to be, it is one not tending to protect the Government against unconscionable advantages, but to give it unconscionable advantages over the claimant.

If it should be held that this new trial was lawfully granted all barriers will be broken down, and the Court of Claims can hereafter arbitrarily grant a new trial in any case in which it may be asked. The court below not only becomes the sole arbiter as to the sufficiency of the evidence which shall satisfy it of the facts alleged, but it may express its satisfaction in the absence of any competent evidence whatever. If it is not necessary to make a new case upon such a motion, whenever a case is reached for a hearing in this court, it may be arrested until the appellant shall try to convince the court below that the judgment ought to be vacated, and after the issue of the mandate of this court upon affirmance of the judgment, the mandate may be made nugatory by the vacation of the original judg-

ment in the court below upon a mere caprice of that court, unrestrained by the proper limitations of the anomalous statute.

The consequences of such a loose construction of the statute were forcibly illustrated in the opinion of the Court of Claims in the case of *Silvey*.

We believe that this case presents the first instance in which any court, whether of law or equity, has granted a new trial to enable a defendant to introduce evidence which was not only constructively in his possession, but was shown to have actually been in the hands of his attorney and purposely withheld on the trial. If such a case as this falls within the statute there is an end of all limitations. If this is fraud, wrong, and injustice practised on the Government, then those words have a dangerous elasticity of construction that may be made to serve any purpose, and the Court of Claims will henceforth be vested with an immeasurable license that will enable it to destroy the finality of judgments in its mere caprice. In fact, the force and finality of no judgment in the Court of Claims can be counted upon until the expiration of the extreme period named in the statute in which it may be recalled by that court.

Second Point.

If the Court of Claims have acted outside of the true meaning and intent of the statute, a writ of certiorari is the proper remedy.

1. There must be a remedy if the Court of Claims has acted erroneously in injuring the plaintiff and ousting the jurisdiction of this court.

It cannot be contended that where a court of original jurisdiction assumes to grant a new trial and to vacate a judgment after the cause has been removed by appeal to this court and is within its jurisdiction, that the plaintiff as to his pecuniary injury and this court as to the attack upon its jurisdiction are remediless. Suppose there was no statute; for if the action of the court was beyond and outside of the statute the case is the same as if it did not exist, could a plaintiff in a Circuit court of the United States be deprived of a judgment for $950,000 two years after the defendant had appealed to this court by the arbitrary and illegal act of the court in assuming to grant a new trial, supplemented by a motion by the defendant, the appellant in this court, to dismiss his appeal?

This court, in the case of the *United States* vs. *Crusell*, (12 *Wall.*, 176,) have determined that such decision shall be reviewed.

Chase, C.-J., delivering the opinion of the court in that case, referring to an objection to the power of the Court of Claims to grant a new trial which depended upon the proper construction of the statute, said *that the decision of the Court of Claims on the point, whatever it might be, could be reviewed in the Supreme Court.*

See also recognition of this by the Court of Claims in *U. S.* vs. *Silvey*, 7 *Nott & Hunt.*, 334.

In *ex parte Russell* (13 *Wall.*, 664) the facts were that the Court of Claims had refused to entertain a motion for a new trial under this statute, because they thought they had no jurisdiction.

The Supreme Court being of opinion that the Court of Claims had misinterpreted the statute and that they did have jurisdiction, decided that the proper remedy was not by appeal, but by a mandamus to compel the hearing of the motion.

In the case at bar just the converse of this is presented. The Court of Claims entertained the motion when one jurisdictional fact was wanting, *i. e.*, any evidence of the character required by the statute as a condition precedent to granting the new trial.

Jurisdiction of a limited nature being conferred by statute, if any requirement of the statute were wanting the proceeding before the Court of Claims was void.

Take, for example, the requirement of the statute that the motion shall be made "within two years after the final disposition of any such suit or claim." Upon the proper construction of these words, "final disposition," the jurisdiction of the Court of Claims depended in *Russell's case.*

That court gave these words a meaning, which, if correct, showed that they had no jurisdiction in the matter. Accordingly they refused to entertain the motion. The Supreme Court took a different view, holding that the Court of Claims had jurisdiction, and that by mandamus they would compel them to exercise it.

Suppose a contrary state of facts: that the Court of Claims had taken the view of the meaning of the words "final disposition" adopted by the Supreme Court, and had taken jurisdiction of the motion and granted the new trial. If the Supreme Court had then held the view of its dissenting judges, Chase, C.-J., and Clifford, J., that the act of Congress did not in that case warrant the granting a new trial, and consequently that the Court of Claims had acted without jurisdiction, would not the court have granted an appropriate remedy to set aside the proceedings? In Russell's case, where the Court of Claims had jurisdiction and refused to act, the Supreme Court said that an appropriate writ would issue to compel action. Conversely, where the Court of Claims acted, but had no jurisdiction to act, the Supreme Court should issue a proper writ to quash such proceedings.

If, then, the writ of *certiorari* is the usual remedy where it is claimed that an inferior court has acted without jurisdiction, the court should grant the petition for the writ in this case.

2. When the jurisdiction of a court depends upon a fact to be proved before itself, to support which fact it is claimed that no proper evidence was offered, the common-law writ of *certiorari* lies to bring the whole matter before the higher court for review.

Certiorari is a writ issued for the purpose of removing some cause, suit, or proceeding from an inferior to the superior court, either for the purpose of examining into the legality of the proceedings, or annulling or quashing an order or judgment of such inferior court, given in a matter over which the court had no jurisdiction.

Add. on Torts, 711.

In this case the Court of Claims have no power to grant a new trial unless upon such evidence as shall reasonably satisfy said court that fraud, wrong, or injustice in the premises has been done to the United States.

This is a fact upon which their jurisdiction depends—a prerequisite to the granting a new trial.

According to the limited power conferred by the statute, the authority and jurisdiction of the Court of Claims to grant a new trial depends upon a fact to be proved before themselves. Such fact cannot be proved without evidence, and if our construction of the statute be correct, no evidence at all tending to prove the fact was offered.

In such a case *certiorari* is the proper remedy.

The *People* vs. *Goodwin*, 5 *N. Y.*, 568. *Certiorari* by the Supreme Court to referees appointed by a county judge to hear an appeal to himself.

The question before them was the laying out a high-road

over a man's land. The statute required the owner's consent.

Ruggles, C. J., says:

"Unless the owner's consent was given that the highway should be so laid out, the referees in laying it out acted without authority, and their proceedings were void for want of jurisdiction. Inferior magistrates, when required by writ of *certiorari* to return their proceedings, must show affirmatively that they had authority to act; and where, as in the present case, their authority and jurisdiction depends upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs given in relation to it for the purpose of enabling the higher court to determine whether the fact be established. The decision of the magistrate as to all other facts is final and conclusive, and will not be reviewed on a common-law *certiorari*. But the main object of this writ being to confine the action of inferior officers within the limits of their delegated powers, the reviewing court must necessarily re-examine, if required, the decision of the magistrate on all questions upon which his jurisdiction depends, whether of law or of fact. The evidence, therefore, upon which to prove the consent of the owner of the land to the laying out of the road was properly stated in the return, and is properly examinable here."

The learned judge then examines this evidence, and comes to the conclusion that the jurisdictional fact was not proved, and the decision of the referees reversed.

People vs. *Knowles*, 47 *N. Y.*, 419. The county judge took certain proceedings under a statute known as the town bonding act.

This act required the judge *to determine a certain fact*, viz., whether the requisite majority of tax-payers had joined in the petition. A writ of *certiorari* was sued out. It was argued by counsel (p. 247) that there was evidence upon the jurisdictional facts to be proven, and the judge

having determined them, the decision cannot be reviewed on *certiorari*.

Rapallo, J., says:

"The application by a majority of the tax-payers was a jurisdictional fact, upon which the powers of the county judge depended. The statute required him, before appointing commissioners to issue the bonds, to take proof of the number of tax-payers joining in the petition, and of the amount of taxable property represented by them, and *to determine* whether the requisite majority had joined.

"To justify an affirmance of the proceedings the return must show affirmatively that the county judge had jurisdiction to make the order. *Where, as in the present case, the jurisdiction of an inferior tribunal depends upon a fact to be proved before itself, and a certiorari issues to review the proceedings*, the proofs of such jurisdictional fact should be returned for the purpose of enabling the higher court to determine whether the fact was established."

Baldwin vs. *City of Buffalo*, 35 *N. Y.*, 381. Commissioners took plaintiff's land, but awarded him no compensation, on the ground that a right of way already existed over the premises. The plaintiff maintained that the evidence showed there was no such right of way, and that therefore the defendants acted contrary to the Constitution in taking his land without compensation.

The question before the court of appeals was as to the form of remedy.

Morgan, J., says:

"According to the decisions in this court, a common-law writ of *certiorari* will bring up so much of the evidence as is necessary to present the question of law upon which the relator relies to avoid the determination of the inferior tribunal." (P. 380.)

P. 381: "It it did not appear before the commissioners by the evidence then taken that a right of way existed over

plaintiff's land, the error of the commissioners could be corrected upon *certiorari*."

In *Swift* vs. *City of Poughkeepsie*, 37 *N. Y.*, 511, where assessors had jurisdiction of the person of the plaintiff and the subject-matter, but their assessment was erroneous, it is said that the remedy in such cases may be by writ of *error* or *certiorari*.

And the court lay down a liberal rule as to the remedy by *certiorari*. Bacon, J.: "I think at this time a more liberal rule would and should be applied, and that a *certiorari* would not only bring up the naked question of jurisdiction, but the evidence on which the body acted to which the writ is directed, as well as the ground or principle of their action, and thus present the entire case for review, and, if necessary, for correction, citing cases, and confirming *Baldwin* vs. *City of Buffalo*, (*supra*,) which is said to hold substantially that the writ will bring up whatever is necessary to present the question of law on which the relator relies."

In *People* vs. *Smith*, 45 *N. Y.*, 772, it is held where a statute required a county judge to *determine* certain facts and render judgment thereon, a writ of *certiorari* may properly issue to such county judge for the purpose of review of his proceedings by the Supreme Court.

That upon the return to such writ the court is not limited to the inquiry whether jurisdiction of the parties and the subject-matter was acquired, but should examine the evidence, and determine whether there was *any competent proof* of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated. In such proceedings *competent common-law evidence* of the facts to be established should be produced before the county judge.

Grover, J., says:

"Whatever may have been the conflict of authority heretofore upon the question whether upon a common-law *certiorari* the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and subject-matter, it must now be regarded as settled in this State that it is the duty of the court in addition thereto to examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether in making it any rule of law affecting the rights of the parties has been violated. (*People* vs. *Board of Police*, 39 *N. Y.*, 506; *People* vs. *Assessors of Albany*, 40 *N. Y.*, 154.) * * *

"The only questions upon which proof is to be taken by the county judge, and which are to be determined by him, are whether the petitioners and such others as appear before the judge and express a desire to join in the petition constitute a majority in number of the tax-payers, &c. * * * The correct determination of these questions is of grave importance, as upon it may depend the creation of a debt against the town to the extent of one-fifth of all the property taxable therein. The policy of the statute is to make such determination final. Competent common-law evidence of the facts to be established should be produced. The statute authorizes no other."

These New York cases cited and approved.
Minn. C. R.R. Co. vs. *McNamara*, 13 *Minn.*, 508.

The principle is clearly expressed by Hornblower, C.-J., in *N. J. R.R. and Tr. Co.* vs. *Suydam*, 2 *Harrison*, *N. J.*, *p.* 33.

Power was given by statute to commissioners to assess the value of land taken by the railroad. *Held*, that this court will set aside the proceedings of such commissioners if they have adopted and acted upon illegal principles in making their valuation of land and assessment of damages. To ascertain which facts, affidavits may be taken and read

before this court on a *certiorari* though the merits of the case may not be be inquired into.

Hornblower, C.-J., says:

"But there is another more serious and substantial objection urged against this award. It is that the commissioners have adopted and acted upon illegal principles in making their valuation of the land and assessment of the damages.

"If anything has been done by a specially delegated power in an unlawful manner, or beyond or in violation of the trusts and authority vested in them, *or contrary to the true intent and spirit of the legislation by which that power was delegated, or in contravention of the object and design of the law*, their proceedings ought to be annulled and set aside. This position was not controverted on the argument, but it was insisted that a *certiorari* does not lie in any case to try the merits, and that therefore the court could not hear affidavits touching the value of the land, or going to show that the commissioners have given too much or too little. In support of this doctrine a number of authorities was cited. But a reference to authorities was not necessary to convince me that upon *certiorari* we have no right to review the merits of the case, or to receive evidence simply to ascertain whether the commissioners have judged discreetly, or whether they have given too much or too little, nor did I understand that the affidavits were offered to the court for that purpose.

"The object of the plaintiffs was by means of affidavits regularly taken in this cause to bring to the knowledge of the court the location, character, and condition of the land, to the end that the court might, if practicable, ascertain the rule or principle of valuation upon which the commissioners had acted. * * *

"Now it will be admitted that whether the commissioners understood the extent of their powers and the duties imposed upon them, and whether in exercising those powers and discharging those duties they were governed by any rule or principle of action, and if by any, then by what rule or principle of action they were governed, are

questions of fact, and they are facts which the plaintiffs have a right to prove if they can. And when the principle of valuation or rule of action upon which the commissioners acted is ascertained, this court is judicially to determine, not whether the assessment made upon those principles was too much or too little, *but whether the principle or rule of action itself was a lawful or unlawful one.*

* * * * * *

"The legislature * * has provided * * that the price of land should be ascertained by commissioners. But in fixing this price they are not to act *ad libitum;* this will not be pretended. They are to discharge the trust reposed in them according to some rule, and form their judgment and determination *upon correct legal principles.* To deny this is to place these commissioners where nobody else in the country is placed: above law and beyond accountability.

* * * * * *

"It only remains, then, to inquire whether the evidence which has been exhibited before the court is sufficient to establish *the fact* that the commissioners have acted under the influence of illegal principles or have made their award upon any improper rule of assessment."

The judge then examines the evidence, and says "the commissioners have exceeded their authority or misused the power and trust reposed in them. Not that they have simply given too much or too little; but they have made their award upon fanciful and speculative grounds, and therefore *upon unlawful and erroneous principles.*"

Ackerman vs. *Taylor*, 3 *Halst.*, (*N. J.*,) 305, holds, that though a statute directs that no *certiorari* shall issue to remove into this court any proceedings had in pursuance of it, a *certiorari* may be issued to bring up proceedings which, although had *under pretence of*, are not *in pursuance of* the act.

Ewing, C. J., says:

"This court, on the principles of the common law, ex-

ercises, by means of the writ of *certiorari*, a superintending power and control over inferior tribunals created by statute, or proceeding in a summary manner. Even where their adjudications are declared to be final and conclusive, although we do not examine the merits of their decisions from which we are restrained by the first effect of the final and conclusive quality attached to them, we nevertheless inquire whether they have exercised or exceeded the jurisdiction given them, whether they have used the powers granted in their creation, or assumed others never confided to them.

"Even if this statute conferred unlimited discretion upon the Court of Claims, a discretion which, as in ordinary cases of granting a new trial, cannot be reviewed, as it rests in the sound discretion of the court, still, if satisfied that the Court of Claims have acted under a mistaken impression of the law, a writ of *certiorari* can properly issue."

In *President* vs. *Patchen*, (8 *Wend.*, 64,) a new trial was refused by the court of common pleas.

The principal question in the case was whether the Supreme Court had the power on *certiorari* to review the refusal of the common pleas. (See p. 57.)

Walworth, Ch., says:

"Although the judges in their return say they refused the application for a new trial *in the exercise of their discretion*, I think it is evident they mistook the meaning of the term, for they admit they declined hearing the affidavits of the absence and materiality of the witnesses on the part of Patchen, and undoubtedly came to the conclusion that they had no power to adjourn the trial, and therefore refused to hear any statement of the facts, and ordered the trial to proceed; this they *mistook for the exercise of a discretion* on the subject. *There* is no reason to suppose that the court did any intentional wrong to the defendant in error, *but the judges have mistaken the law.* An improper exercise of discretion, as in refusing a new trial or the postponement of a cause in a common-law court, is not a ground for a writ of error; but where palpable in

justice has been done by an inferior jurisdiction in the exercise of a discretionary power in opposition to the settled principles of law and equity, their proceedings may be corrected either by *certiorari* or mandamus. * * *

"The application to put off the trial and the affidavits and offer upon which it was founded were a part of the proceedings in the cause, which it was the duty of the judges to return on the *certiorari*."

If the Court of Claims has acted without jurisdiction or authority, the writ of *certiorari* is a proper remedy, even if there be another remedy by appeal.

In *Rex* vs. *Mosely*, 2 *Burr*, Lord Mansfield says: "A *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds."

Accordingly a *certiorari* was granted, though it was claimed that a writ of error lay.

In *ex parte, Boynton*, 44 *Ala.*, 261, *Held*, That *certiorari* is a proper remedy to remove for revision a cause from the probate to the appellate courts, where the order, decree, or proceeding complained of is claimed to be void. If such action occurs in a court from which an appeal may be taken to this court, resort may be had directly for the exercise of its powers of general superintendence and control of inferior jurisdiction.

In *New Jersey R.R. & Tr. Co.* vs. *Suydam*, 2 *Harris*, (*N. J.*,) 40, Hornblower, C.-J., says:

"In the course of this opinion, already too long, I have have not examined the authorities so numerously cited and so elaborately discussed, upon the argument touching the office and effect of a writ of *certiorari* and the jurisdiction of this court in proceedings removed here by such writ. It is sufficient to say that a *certiorari lies in all cases, unless taken away by the express words of a statute;* and not only where there is another remedy, *but even where an appeal is given upon the merits.*"

Hartsfield vs. *Jones*, 4 *Jones' Law*, (*N. C.*,) 311, Battle, J., says:

"The writ of *certiorari* lies to a court of record, and may be used for the same purpose as a writ of *error* in the regular form. It is true that in the case of *Brooks* vs. *Morgan*, (5 *Ire.*, 481,) it is said by the court that the writ has been used by necessity for the correction of errors in law in those cases where the right of appeal has not been given. We cannot perceive any sufficient reason why it may not be so applied in all cases, as it will be but another form of the writ of error. That writ, in England, issues out of the Court of Chancery, but here we have no office in our court of chancery out of which to issue a writ. It must therefore be issued from the superior to the inferior court of record, and whether it be in the well-known form of the *certiorari*, or in any other form, can make no difference in the rights of the parties litigant."

3. *Certiorari*, and not writ of error, is the proper appellate proceeding to review the final adjudications of special statutory tribunals, which act in a summary way, different from the course of the common-law.

The writ of *certiorari* is defined to be "a writ issued from a superior court to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case. When any error has occurred in the proceedings in the court below different from the course of the common law in any stage of the cause, in either civil or criminal cases, the writ of *certiorari* is the only remedy to correct such error, unless some other statutory remedy has been given."

Bouvier's Law Dictionary.

Powell on Appellate Proceedings, p. 349, says:

"After judgment, the question whether the appellate proceedings should be a *certiorari* or a writ of error will

depend upon the question whether the judgment or proceedings to be reviewed were proceedings and record in accordance to common law or a summary proceeding. If the former, the proceedings must be by writ of error; but if the latter, it should be by *certiorari*."

Again, on p. 358:

"The object of a writ of *certiorari* is to enable the superior and appellate courts to review the judicial proceedings of the inferior, or where the proceedings are summary or not in accordance with common-law record proceedings."

In *Campbell* vs. *Strong*, 1 *Hemp.*, (*U. S. Circuit*:)

"The proceedings in the case before the court is dependent for its validity alone upon the 30th section of the act of 1825, and is altogether contrary to the course of the common law. * * * The doctrine is, where a new jurisdiction is created by statutory provision authorizing a proceeding not known to the common law the writ of error will not lie, but a *certiorari* will."

The same doctrine is the settled law of Ohio.

Powell on Appellate Proceedings says, *p.* 350, § 6:

"When the matter to be reviewed, even in a court of record, was a mere matter upon motion, or some summary proceeding, a *certiorari* is the proper proceeding to review the final determination thereon."

See the cases there cited, especially the case of *Baxter* vs. *Columbia Township*, 16 *Ohio*, 26, directly in point. (Cited in full, later.)

In New Jersey, see *State* vs. *District Medical Society*, 6 *Vroom*, 206, Van Syckel, J., says:

"A writ of *certiorari* is in the nature of a writ of error, and is resorted to in those cases where a writ of error does not lie. Where courts act in a summary way or in a new

course different from the common law, a *certiorari* and not a writ of error is the proper remedy.

"There is no doubt of the power of the supreme court by virtue of the common-law writ of *certiorari* to review the final adjudications of special statutory tribunals which act in a summary way different from the course of the common law," (citing)—

1 *Archibald's Pr.*, 229.

Groenwelt vs. *Burwell*, 1 *Salkeld*, 264.

Phillips vs. *Phillips*, 3 *Halstead*, 122, (quoted in full further on.)

A very late case, *Curtiss* vs. *Steener*, 36 *N. J.*, (7 *Vroom*,) 304, on this point cited in full further on.

4. The Court of Claims, when acting under the statute of June, 1869, is such a tribunal proceeding in a summary way.

The report of the case of *Groenvelt* vs. *Burwell*, 1 *Salk.*, 263, is as follows:

"It was held in this case, per Holt, C.J., that wherever a new jurisdiction is erected by act of Parliament, and the court or judge that exercises this jurisdiction acts as a court or judge of record *according to the course of the common law, a writ of error lies on their judgments;* but where they act in a summary method, or in a new course different from the common law, there a writ of error lies not, but *a certiorari.*"

The Court of Claims is a new jurisdiction created by Congress.

From a final judgment given in the ordinary course of its proceedings as a court of record, according to the course of the common law, a writ of error lies to the Supreme Court. The law of Congress giving the power to grant a new trial in a case pending in another and higher court is a special power conferred upon the Court of Claims after

its general and common-law jurisdiction is exhausted. In exercising this it acts as a distinct tribunal, upon which a novel power of regulating the disposition of cases pending elsewhere has been conferred.

"The statute, for its purpose of public protection, creates a special subject of jurisdiction here as far removed from our general jurisdiction as if it had been vested in another court, for it includes not only judgments final here but those removed from our jurisdiction by appeal to the Supreme Court, and pending there, or finally acted on there; and it authorizes us to stay the payment of such judgments and direct new trials here.

"It is manifest that neither these subjects of jurisdiction, nor the power conferred for our action on them, belong to our general jurisdiction, or are within its compass; and it is also manifest that the statute attaches, and did attach, in this case after all the litigation here had been fulfilled to which the United States submitted themselves under our general jurisdiction, and after that was *functus officio*."

Per Loring, J., U. S., M. Silvey, 7 C't of Cl., 328.

"What, then, is the nature of this anomalous power conferred upon the Court of Claims, as something distinct from its general jurisdiction, and after the latter is *functus officio?* Is it a summary or a common-law proceeding?

"The meaning of this term *summary* is such proceedings as are not according to the course of common law, (4 *Bl. Com.*, 280;) or, in other words, proceedings may be called *regular* or *summary*. Whenever a court acts, or professes to act, upon common-law principles, its proceedings are called *regular*, and not summary, however expeditious they may act. But where a court of ancient common-law jurisdiction is by some law authorized to act different from the common-law mode, it is called a summary proceeding."

Phillips vs. *Phillips* 3 *Halst.*, (*N. Y.*,) 124, by Ewing, *arquendo*.

It was admitted in that case that "where the proceed-

ings are not according to the course of the common law, and are of a summary nature, there a *certiorari* may be used in the nature of a writ of error, and in *the place of a writ of error*, and this as well in civil as in criminal proceedings." But counsel showed, under the distinction above given between summary and regular proceedings, that the court of common pleas to which *certiorari* was issued was not acting different from the course of the common law. It was acting, or professing to act, according to common-law principles, and in a common-law mode.

The court, agreeing with counsel, quashed the writ.

But in the case at bar, the Court of Claims, in granting new trials, is acting as a special statutory tribunal, with powers and a manner of proceeding utterly unknown and at variance with the common law. The proceeding is a new one created by statute, and totally distinct from the general jurisdiction of the court. In technical language, it is a summary proceeding, and in such cases it is settled law, as shown by the authorities above cited, that the proper way to review the decision of the lower court is by writ of *certiorari*, and not by writ of error.

The following cases are directly in point as showing this distinction between the regular proceedings of a court which can only be reviewed in the higher court by writ of error, and special statutory powers, unknown at common law, which, though conferred upon the same court whose ordinary proceedings are corrected by writ of error, can only be reviewed by writ of *certiorari*.

In *Allen* vs. *Williams*, 1 *Hay*, *North Carolina*, an attachment issued in the county court. There was mistake in the proceedings, and a *certiorari* was brought. It was insisted upon the other side that, admitting mistake, a writ of error was the proper remedy. *Held*, That *certiorari*

lay, and was, indeed, the only proper writ, the attachment law being not according to the course of the common law.

The case of *Curtiss* vs. *Steener*, 36 *N. J.*, (7 *Vroom*,) is a very late and strong case on this point.

A writ of certiorari was issued to the *circuit court* to review proceedings had in that court under the attachment act, though a writ of error was the regular method of appeal from that court, as shown by another case reported in the same volume, *Hall* vs. *Gildersleeve*, 36 *N. J.*, 236, where a writ of error was the method by which an appeal from a decision of the court under its regular powers was brought to the Supreme Court.

The question arose as to the proper form of remedy. *Held*, That the proceedings under the attachment act being special and statutory, the proper remedy for review is by *certiorari*.

Scudder, J., says:

"There is no doubt that it is within the power of this court to control the abuse of the writ of attachment in a court of inferior jurisdiction, *nor can there be a question that the plaintiff has adopted the proper form of remedy.* The proceedings under our attachment act are special and statutory, not according to the course of the common law, and therefore the proper method of review is by writ of *certiorari*."

In *Baxter* vs. *Columbia Township*, (16 *Ohio*, 56,) an action was brought in the court of common pleas under an act to support illegitimate children. By statute in Ohio the regular method of appealing from final judgments in this court of common pleas and others is by writ of error, which is allowed as matter of course, and in this case a writ of error was brought to reverse the judgment.

Held, That *certiorari* is the proper remedy, and not writ of error.

Avery, J., says:

"The distinction between writs of error and writs of *certiorari* has been for a long time settled by this court, but more recently it has often become necessary to apply it in practice. Writs of error have been confined to the cases of judgments in proceedings after the course of the common law, and according to that determination a writ of error in the present case cannot be sustained, for the judgment sought to be reversed is not of that description.

"The case must, therefore, be stricken from the docket as irregularly here."

Under these authorities the proper method of reviewing an error of the Court of Claims when acting contrary to the regular course of proceedings at common law and beyond their general jurisdiction under a special statutory power conferred upon them is by writ of *certiorari*, and not by writ of error.

The distinction between mandamus and *certiorari* is well stated in *Appling* vs. *Bailey*, (44 *Ala.*, 333,) where it is said "that mandamus lies from a superior to an inferior court, to compel action; but where a court has acted, its action can only be revised by the superior court on appeal or *certiorari*."

The same principle is applied where a court has a limited power to reinstate appeals. *Howell* vs. *Van Ness*, (2 *Vroom*, *N. J.*, 443,) was a *certiorari* to set aside an order of the court of common pleas reinstating an appeal.

The court of common pleas, not upon the ground of surprise and merits, but on some error, real or supposed, of the justice, had ordered an appeal from his decision to be reinstated.

Haines, J., says:

"The power to reinstate an appeal is clear, but it must be for some good cause shown. If it were dismissed on a

misapprehension of the law, as in 2 *Han.*, 76, or on a mistake of the facts, as in 3 *Han.*, 310, it is the duty of the court to reinstate, and if it refuse a mandamus will issue from this court commanding it to be done. * * * But when an appeal has been properly dismissed, and there is no error in law or mistake in fact, and no surprise, the power of the common pleas over it is gone, their jurisdiction is then exhausted, and they cannot legally reinstate the appeal. Their decision in such a case is as final as if they had rendered judgment upon the merits, and they have no power to reinstate or to grant a new trial.

"It is suggested that the order to reinstate an appeal is the exercise of a discretion, and not assignable for error; that it is like the granting a new trial in a common-law court, which no writ of error will correct. But it is not a matter of discretion. If the appeal had been improperly dismissed the court was bound to reinstate it, and on refusal so to do would by a writ of mandamus be required to do it."

Accordingly it was *Held*, That the reinstatement of an appeal is not a matter of discretion, and *if done improperly* the proceedings may be set aside in this court by *certiorari.*

5. By writ of *certiorari* this court will maintain its rightful jurisdiction over the case, and maintain the validity and integrity of its mandate in the event of the Government appeal being dismissed, or of the affirmance of the judgment upon appeal.

The extraordinary nature of the power conferred upon the Court of Claims by the statute gives an effect to its decisions in granting new trials, which, if wrong, a writ of error is without power to prevent or properly remedy.

This case is now regularly in the Supreme Court, by appeal, for the final decision of the issues involved. The only way in which the jurisdiction of this court, thus ac-

quired, can be impaired or ousted is by the exercise of a statutory power granted to another tribunal. Whatever the construction of this statute may be, it is plain that its requirements must be *strictly pursued*, and if not so followed the action of the Court of Claims is not effectual to remove the cause from this court.

But the novel nature of the proceedings is such, that if the statute has been misconstrued and a new trial granted in a case unauthorized by the power conferred, nevertheless this court will be bound to surrender its jurisdiction, though it may afterwards be compelled to reinstate the appeal when called upon to determine the true construction of the statute. If the Court of Claims have mistaken the law, an appeal will not, as in ordinary cases, stay the proceedings and leave matters *in statu quo;* but long before the true meaning of the statute can be settled upon appeal, the mischief caused by the mistaken exercise of power will be done. The jurisdiction of this court will be ousted by the proceeding of another tribunal, over which it has appellate power, and by a proceeding, the record of which would disclose the error on its face if brought before this court.

§ 14 of the Judiciary act of 1789, R. S., § 716, declares that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, *which may be necessary for the exercise of their respective jurisdictions agreeably to the principles and usages of law.*

If the Court of Claims had no right under the statute to grant a new trial, still the effect of its order, if unreversed, will be that a jurisdiction must be lost by this court, not voluntarily, but in obedience to the order of an inferior court, which order, if not strictly in pursuance of the power

conferred by statute, is absolutely null and void, and to be disregarded by this court as an unauthorized attempt by an inferior court to regain control over a cause which has passed beyond its jurisdiction.

Before, therefore, submitting to the case being withdrawn from its jurisdiction, when the power in obedience to which the Supreme Court is to act has been illegally exercised and not strictly pursued, it is the prerogative of this court to be satisfied that the Court of Claims have not granted a new trial without jurisdiction or authority, or through mistake of law, or by an abuse of their discretion. And in the exercise of this prerogative a writ of *certiorari* should properly issue, the court being authorized by the judiciary act to issue any writ which may be necessary for the exercise of its jurisdiction agreeably to the principles and usages of law.

In cases where the Supreme Court had no jurisdiction, either original or appellate, it has refused to issue writs under section 14 of the judiciary act, holding that its power to originate such writs is not unlimited, as it is, for example, in England. The power of courts in general to issue a *certiorari* is well stated in *The King* vs. *Inhabitants of Glamorganshire*, (1 *Ld. Raymond*, 580.)

The Court of King's Bench says:

"This court will examine the proceedings of all jurisdictions erected by act of Parliament, and if they, under pretence of such act, proceed to encroach jurisdiction to themselves greater than the act warrants, this court will send a *certiorari* to them to have their proceedings returned here, to the end that this court may see that they keep themselves within their jurisdiction, and if they exceed it to restrain them."

This same power is vested in the higher courts of the different States. Thus, in *Ackerman* vs. *Taylor*, (4 *Halst.*,

N. J., 69,) Ewing, C.-J., after quoting the above passage, adds:

"The general superintending power of this court over the proceedings of inferior tribunals, especially of such as are created by statute, and possess special powers only, and exercise a limited jurisdiction, is unquestionable."

The distinction between this general power to originate writs and the power which by the Constitution is conferred upon the Supreme Court of the United States is stated in the case of *Ex parte Vallandigham*, (1 *Wall.*,) where the writ of *certiorari* was asked for to review the findings of a military commission.

This court said:

"Our first remark upon the motion for a *certiorari* is that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court and the other inferior courts of the United States, and to the judges of them to issue such processes, and the prerogative power by which it is done in England."

"*The purposes for which the writ is issued are alike*, but there is no similitude in the origin of the power to do it. In England, the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have any indictment removed and brought before it; and where such *certiorari* is allowed it is awarded at the instance of the king, because any indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress."

The opinion of the court then proceeds to discuss those clauses of the Constitution and the act of Congress under which it derives jurisdiction, and reaches the conclusion that its original jurisdiction is conferred by the terms of

the Constitution, and its appellate power must be exercised subject to the exceptions and regulations made by Congress.

Metzger's Case, 5 *How., U. S.*, 177, is cited in the opinion, where a motion for a writ of *habeas corpus*, to be issued under the authority of § 14, was refused because the court could exercise no power in an appellate form over the decision of a district judge at chambers, and not in court.

Commenting on this decision this court said: "There the judge exercised a special authority under a treaty, and no provision had been made for the revision of his judgment. So does a court of military commission exercise a special authority."

Accordingly the court held that they could not originate a writ of *certiorari* to review and pronounce any opinion upon the proceedings of a military commission.

The distinction between that case and the present is clear.

There the conclusion of the court was that the power to issue writs, as given by § 14, was confined to cases where the Constitution gave it original jurisdiction; as, for example, suits by ambassadors, or where a State shall be a party, or else where it had appellate jurisdiction, but where it had neither original nor appellate jurisdiction there was no power to originate such writs.

But the Supreme Court has no power by appeal or otherwise to review the proceedings of a military tribunal. If wrong is done, redress must be sought from the Executive Department. Accordingly the attempt to obtain by writ of *certiorari* a review of proceedings over which the court had no appellate power, failed.

Applying the reasoning of the court to this case, the purposes for which the writ of *certiorari* is issued by this court are the same as those which prevail in the Court of King's Bench, but the source of the power to issue the

writ must be found in the statutes granting appellate jurisdiction.

"An appeal to the Supreme Court shall be allowed on behalf of the United States from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine." (*Sec.* 707, *Rev. Stat.*)

Here is a full grant of appellate jurisdiction which supplies all that was wanting in *ex parte Vallandigham.*

Being thus vested with appellate jurisdiction, the statute further provides how it may be exercised in section 716: "The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias.* They shall also have power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

That *certiorari* is one of these writs is undoubted, for it is under this grant of power that such writs are issued upon a suggestion of a diminution of a record.

It is, therefore, in the exercise of its appellate jurisdiction that the court is asked to review the proceeding, and to do so by issuing the writ of *certiorari* as being necessary for the exercise of its jurisdiction.

The authority given this court to issue writs of mandamus is expressed in the same language as in the statute just cited.

§ 688. "The Supreme Court shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law to any courts appointed under the authority of the United States," &c. (Rev. Stat.)

Under this statute a writ of mandamus was issued to compel the Court of Claims to hear and decide a motion for a new trial.

Russell's Case, 13 *Wall.*, 664.

As long ago as the case of *Marbury* vs. *Madison*, 1 *Cranch R., p.* 137, it was held that this court could not issue this writ as an exercise of original jurisdiction. In *Russell's Case* it was granted by this court in the exercise of its appellate jurisdiction.

That case had been appealed to this court, the judgment had been here affirmed at a former term, and the mandate issued to the court below, so that the cause was not then within the jurisdiction of this court; but a motion having been made for a new trial under this statute, the lower court decided that it had not power to grant one. From this decision the Government prayed a second appeal, which was allowed.

Before the record had been lodged in this court, the claimant asked for a mandamus to vacate the allowance of the appeal. On this condition of the record, it was held—

1st. That the appeal taken by the Government could not be maintained, but would be dismissed upon motion, as soon as the record should be filed;

2d. That the mandamus asked by the claimant could not be granted;

3d. That a mandamus would be granted on motion of the United States to compel the court below to proceed to hear the motion for a new trial upon its merits.

There is, as has been stated, a close analogy between this case of *Russell* and the one at bar. There a motion was made, which the court should have considered, but which it refused on the ground of want of jurisdiction. An appeal would not lie, because there was no final judgment, and this court decided that its appellate power could

be exercised by issuing the extraordinary writ of mandamus, thereby reversing the decision, and compelling the court below to exercise its proper jurisdiction.

Here the converse of such a case is presented. The court below proceeds to exercise a jurisdiction not conferred by law, and thereby vacates a judgment not within its authority. An appeal does not lie because there is no final judgment, and because the case is already in this court by appeal; and we ask the court to protect and preserve its jurisdiction by issuing a writ of *certiorari* for the purpose of correcting this wrong.

If its appellate power enables the court to compel an exercise of lawful jurisdiction by one summary process, the same power enables it to vacate an unlawful exercise of jurisdiction by another summary process. If a writ of mandamus will lie in one case a writ of *certiorari* will in the other.

In analyzing Russell's case, the principles upon which the court acted will be found to be that the Government suffered a wrong by the refusal of the court to hear its motion for a new trial. This wrong was one which could not be remedied by appeal, and the writ of mandamus was allowed as providing the convenient and appropriate remedy.

It is by precisely the same reasoning that we apply for the writ of *certiorari*.

THIRD POINT.

The writ of *certiorari* should issue as prayed for.

JAMES THOMSON,
CHARLES F. PECK,
Attorneys for Petitioner.

W. W. McFARLAND,
WM. M. EVARTS,
of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

JOHN YOUNG, ASSIGNEE OF ALEXANDER COLLIE, PETITIONER FOR CERTIORARI TO THE COURT OF CLAIMS.

No. .

And now the respondents come and say that for all and aught in the said petition contained, the same ought not to be granted, because it is insufficient in law to entitle the petitioner to the writ or the relief prayed for; wherefore they pray that the petition may be denied and dismissed.

EDWIN B. SMITH,
Assistant Attorney-General.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, APPELLANTS,
vs.
JNO. YOUNG, ASSIGNEE OF ALEX. COLLIE. } No. 119.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF UPON THEIR MOTION TO DISMISS THEIR APPEAL.

U. S. v. Ayres, 9 Wall., 608.

The appellants, desiring to discontinue the prosecution of their appeal, and to have the same dismissed, obviously have the right to do so, as has been authoritatively determined by this court in the above decision, which precludes discussion of the question. (*Ex parte* Russell, 13 Wall., 664; *ex parte* United States, 16 Wall., 699.)

EDWIN B. SMITH,
Assistant Attorney-General.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE UNITED STATES, APPELLANTS,
vs.
JNO. YOUNG, ASSIGNEE OF ALEX. COLLIE. } No. 119.

APPEAL FROM THE COURT OF CLAIMS.

MOTION BY APPELLANTS TO DISMISS THEIR APPEAL.

The United States, appellants, move to dismiss their appeal in the above-entitled cause, the Court of Claims having granted a new trial of the same.

EDWIN B. SMITH,
Assistant Attorney-General.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

JOHN YOUNG, ASSIGNEE OF ALEX'R COLLIE,
PETITIONER FOR CERTIORARI,
vs.
THE UNITED STATES, RESPONDENTS.

No.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

JOHN YOUNG, ASSIGNEE OF ALEX'R COLLIE, petitioner for certiorari,
vs.
THE UNITED STATES, RESPONDENTS.
} No.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The object of this petition is to have brought before this court upon certiorari the action of the Court of Claims in granting a motion there made by the United States for a new trial of the case of the petitioner in which that court gave judgment, May 15, 1874, in his favor for $952,076.71. The cause was thereupon appealed to this court, entered here at the October term, 1874, and is No. 119 upon the docket of the present term. It is numbered 2726 in the Court of Claims. On the 5th day of December last the Attorney-General filed there his motion for a new trial, supported by sundry affidavits and documents, "which evidence the United States, by its Attorney-General, says has been discovered and obtained since the trial of the case, and which evidence the United States, by its Attorney-General, in-

sists should satisfy the court that fraud, wrong, and injustice in the premises have been done to the United States by the recovery by said Collie of said judgment."

The statute authorizing a new trial in that court is R. S., secs. 1087 and 1088.

"SEC. 1087. When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

"SEC. 1088. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial, and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

That authorizing certiorari is R. S., sec. 716.

"SEC. 716. The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

BRIEF.

It is by no means conclusive of the present application that (so far as I can discover) it is the first of the kind which the records of this court disclose, during the

century of its existence, notwithstanding the multitudinous occasions in which suitors must have considered themselves aggrieved by the action of inferior tribunals upon interlocutory motions; but its novelty, and the mischievous consequences of adopting this course now, are fair topics of remark and consideration.

Mr. Justice Baldwin said, at the January term, 1831: "No new question of jurisdiction ought to be acted upon without an inquiry into the power of the court to grant the motion or to issue the process." (*Ex p.* Crane, 5 Peters, 201.) The half-century nearly which has since intervened has only added force to the caution.

A diligent examination of the English authorities fails to discover any instance in which certiorari has been made to subserve the purpose sought to be accomplished by it here.

The writ of certiorari is not specifically mentioned in any Federal statute. Authority for its issue, so far as it exists, and in appropriate cases, is found in R. S., sec. 716, a transcript of the act of September 24, 1789, c. 20, § 14, 1 Stats., 81, giving to the courts of the United States power "to issue all writs not specifically provided for by statute, which may be *necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law."

To authorize its issue, then, it must be shown to be "*necessary*,"—not to ascertain whether or not *some other* court has properly exercised its jurisdiction or has exceeded it, but to the exercise of this court's own jurisdiction.

It may be remarked, in passing, that it is only the common-law writ that is ever issuable by this court.

Few of those cases, therefore, decided under State statutes specially authorizing the writ can have any authority or application here.

The nature of the writ, when issued, is determinable by the common law; the right to have it issue, "agreeable to the principles and usages of law," is qualified by the preceding words of the judiciary act of 1789, as above cited from R. S., sec. 716, that it can only be granted where "necessary for the exercise of the jurisdiction" of the court granting it.

In England, and in many of the States, the writ issues to remove an indictment or civil cause from an inferior to a superior court *for trial*, and in many States it is "but a substitute for an appeal. (Hurd *v.* Tombes, 7 Howard, (Miss.,) 234; Com. *v.* Simpson, 2 Grant's Cas., 438; Dougan *v.* Arnold, 4 Dev., (Law,) 101; Burk *v.* Davidson, 5 Humph., 425; Perkins *v.* Hadley, 4 Hayward, (Tenn.,) 143; Kearney *v.* Jackson, 1 Yerg., 294.)

This function of the writ, however, having no bearing upon the present application, will not be further noticed in this brief.

"There is no analogy between the power given by the Constitution and law of the United States to the Supreme Court and the other inferior courts of the United States and to the judges of them to issue such processes and the prerogative power by which it is done in England." (*Ex. p.* Vallandigham, 1 Wallace, 249.)

With the before-mentioned immaterial exception, whenever the writ issues it is for one of two purposes, viz, either to exercise the supervisory power of the court issuing it over that to which it runs, or else as auxiliary to some other process by which the record of

the latter, in a given case, is brought before the former, upon suggestion there made of a diminution or defect therein. (Dunlap's Forms, 4th ed., 239, 240.) It is in such instance only that its issue becomes "necessary for the exercise of the jurisdiction" of the issuing court over the cause previously brought within that jurisdiction.

At common law the writ issued from a superior to an inferior tribunal for both these purposes, by virtue of the right of the former to supervise and control procedure in the latter and to restrain it within its proper jurisdiction in all its proceedings, as well as for the information and guidance of the superior court in finally disposing of the cause upon its merits. As to the first of these uses, it is said in Birdsall *v.* Phillips, (17 Wend., 468,) "This writ is but an emanation from the general supervisory duty of the Supreme Court to restrain the action of all inferior magistrates within their legal grasp." (1 Mopell's Practice, 264, *et seq.*) "The supreme court [of Penn.] thus having no power to review the merits, can only *under its general power to supervise the proceedings of inferior tribunals* bring up the record for this special purpose." (*In re* Sheppard, 77 Penn., 301.)

The second use of the writ, to rectify omissions, &c., is too common and familiar in this and every other superior court to require notice. (U. S. *v.* Adams, 9 Wallace, 663.)

I.

No such *supervisory* duty rests upon this court. Its appellate power—the instances in which and circum-

stances under which it can be appealed to—are distinctly defined by law. Though this power is conferred by the Constitution, it is limited to those matters for which Congress has made statutory provision. (*Ex. p.* McCardle, 7 Wallace, 513; *Ex. p.* Vallandigham, 1 Wallace, 251.)

"This court can exercise no appellate jurisdiction which is not given to it by statute." (U. S. *v.* Nourse, 6 Peters, 495.)

"This affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." (Durosseau *v.* U. S., 6 Cranch, 314.)

"The Supreme Court possesses no appellate power in any case unless conferred upon it by act of Congress, nor can it, when conferred, be exercised in any other form *or by any other mode of proceeding* than that which the law prescribes." (Barry *v.* Mercein, 5 Howard, 119; U. S. *v.* Curry, *Id.*, 113; Wiscart *v.* Dauchy, 3 Dallas, 327; Forsyth *v.* U. S., 9 Howard, 572.)

No court "can assert a just claim to jurisdiction exclusively conferred upon another or *withheld from all.*" (Sheldon *v.* Sill, 8 Howard, 449.)

The appellate power is distinct from a supervisory power. (Baxter *v.* Brooks, 29 Ark., 180, 181; Milliken *v.* Huber, 21 Cal., 169.)

By the bankrupt act of March 2, 1867, c. 176, § 2, (14 Stats., 518,) the several circuits courts "have a general superintendence and jurisdiction of all cases and questions arising under this act." This has been held to be distinct from the appellate power vested in those courts, thus conforming to the construction given by the Mas-

sachusetts courts to the insolvency legislation from which this provision was borrowed. In a case arising in his circuit, Chase, C. J., said: "The better and, indeed, as it seems to me, the only construction which gives due effect to all parts of the act relating to revisory jurisdiction seems to be that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the circuit court the appellate jurisdiction defined by the eighth section, and, on the other, brings within the category all decisions of the district court or of the district judge at chambers, which cannot be reviewed upon appeal or writ of error under the provisions of that section. The exercise of the general jurisdiction is not placed by the act under specific regulations and restrictions, like the proceeding by appeal or writ of error." *In re* Alexander, (2 Am. L. T. Bank. Rep., 84, and 3 Bank. Reg., 6; Mead *v.* Thompson, 15 Wallace, 638; Hall *v.* Allen, 12 Wallace, 454; Morgan *v.* Thornhill, 11 Wallace, 80; Gen. Stats. of Mass., c. 118, § 16; Palmer *v.* Dayton, 4 Cush., 270; Thompson *v.* Thompson, *Id.*, 127; Harlow *v.* Tufts, *Id.*, 452; Cheshire Iron Co. *v.* Gay, 3 Gray, 533; Bump on Bankruptcy, 265, 266.)

The supervisory power, like the appellate, is entirely the creature of statute.

Extraneous considerations of propriety might be suggested why this court might, reasonably enough, be invested with authority to issue this as a supervisory writ in preference to inferior tribunals; but the statute aforesaid, under which alone the writ can issue, confers the same power, in like terms, upon the circuit and district courts; so there is nothing in the legislative language itself to authorize this court to issue it, as an exercise of

supervisory power, any more than a circuit or a district court. Either court undoubtedly *can* issue it as an ancillary writ, to bring up the record of a magistrate or inferior tribunal relating to a cause properly depending before the issuing court for trial; but what we now wish to emphasize is, that, if deduced from the statute, the supervisory power, if it exist at all, is conferred alike upon "all the before-mentioned courts of the United States," (1 Stats., 81,) or else it is not possessed by either of them. We believe it is given to none.

This court is expressly authorized to issue mandamus, *eo nomine*, (R. S., sec. 688;) but the circuit courts, for their power to resort to it, depend entirely upon this very section (R. S., 716) upon which the present application is grounded. The decisions of this court, therefore, in cases where mandamus has been issued or sought from the circuit courts are pertinent. At the February term, 1813, it declared, per Johnson, J., that "the power of the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction." (McIntire *v.* Wood, 7 Cranch, 506; Graham *v.* Norton, 15 Wallace, 429; Bath *v.* Almy, 13 Wallace, 247; Hough *v.* Western Transp. Co., 1 Bissell, 425; *In re* Cromie, 2 Bissell, 160.) The ground of these decisions is that no statutory power is given to the circuit courts to issue mandamus as an original writ. *Mutato nomine*, the same reasoning applies to this court with reference to certiorari.

If this court could issue certiorari *as a supervisory writ*, it must be done as an act of original jurisdiction, in the exercise of an assumed power to regulate and

control all proceedings in inferior Federal courts, by some other precept than a writ of error, or upon appeal. Not only has no such power been conferred by Congress, but this court at an early day (February term, 1893) declared that it was not competent to be done; that Congress could not constitutionally confer, nor this court accept, original jurisdiction in cases not already indicated by the Constitution. (Marbury *v.* Madison, 1 Cranch, 175, 176.) Substituting the word "certiorari" for "mandamus," the language of that opinion answers this petition: "To enable this court to issue mandamus [certiorari] it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction." (1 Cranch, 175.)

The court will now perceive the motive with which the motion to dismiss our appeal in No. 119 was filed as a distinct matter and sought to be presented at a different time. It was squarely to present these propositions: If this petition is for an original process, it cannot be maintained. If it is for an auxiliary one, *necessary* that this court may exercise its jurisdiction over the very case made and appealed in No. 119, it must fall with the vacation of the judgment appealed from, which was thereby withdrawn from the jurisdiction and consideration of this court. (U. S. *v.* Ayres, 9 Wallace, 610; U. S. *v.* Crusell, 12 Wallace, 176.)

The legal conclusion from the decisions of this court, from the earliest to the present day, is this: *Original* jurisdiction exists only in those specified cases, and as to those particular persons enumerated in the Constitution, and it cannot be extended beyond these by any legislation; *appellate* jurisdiction is limited to those causes, questions, and methods declared and established

by Congress; a *supervisory* power, neither original nor appellate, if it can be conceived of as a legal abstraction, finds no sanction anywhere—neither in the Constitution nor the laws. The supreme court of California has so construed this phraseology. (Milliken *v.* Huber, 21 Cal., 169; Wilcox *v.* Oakland, 49 Cal., 31.)

Wherever appellate jurisdiction is exercised, under existing statutes, it must be either through the medium of a writ of error or by appeal; nor will the fact that neither of these methods will meet the requirements of the supposed emergency justify the resort to any other. (Forsyth *v.* U. S., 9 Howard, 572.)

"The district judge is proceeding in the cause, however irregular the proceeding may be deemed; and the appropriate redress, *if any*, is to be obtained by an appeal after the final decree shall be had in the case." (*Ex. p.* Whitney, 13 Peters, 408.)

Where a supervisory (as well as appellate) power is expressly given, as it has been by the several constitutions of Arkansas, "and the law provides no mode of its exercise, this [certiorari] is the proper remedy." (Baxter *v.* Brooks, 29 Ark., 180, bottom.)

If the fact that there is no remedy by writ of error or by appeal for the particular grievance complained of would justify a resort to certiorari, then but little more of that civil business which has heretofore almost exclusively occupied the attention of this court can be transacted here. Your time and deliberations will be consumed in hearing petitions to bring up from the various circuit and district courts criminal cases or civil causes in which less than $5,000 damages are claimed, because writs of error will not lie therein, and appeals cannot be taken.

II.

This strong line of decisions against the existence of the right to issue this writ as an original, supervisory process, and the weighty objections to the exercise of any such right if possessed, and the obvious desire to make the application before our motion was filed to have our appeal in No. 119 dismissed, indicate that the petitioner will ask for the writ, in the present instance as an ancillary process. This position is also indicated by some of the phraseology of his application, though other expressions would seem to claim it under some supposed right of superintendence in this court. The petition confounds the two functions of the writ.

In many States this writ is employed to bring up the whole record together when an appeal is taken. (Peters *v.* Peters, 8 Cush., 538; *In re* Walker, 2 Dallas, (Pa.,) 190.)

It is more commonly resorted to, however, in order to obtain a certification of the record below, where a diminution or defect is suggested. (3 Bouv. Inst., 557, § 3359; Fowler *v.* Lindsay, 3 Dallas, 413; Hilliard on New Trials, 545, ch. xx, § 5.) For this purpose—and, hitherto, for this purpose only—this court has very frequently employed it. No other use of it is hinted at in any opinion of this court, nor by any author writing upon its jurisdiction and practice. The right so to use it is unquestionable; but there is nothing in the cause at bar that requires or justifies recourse to it. It is not "necessary" to the exercise of the jurisdiction of this court in any just sense in which that word can be taken, even if it be here the equivalent of "proper;" since the necessity for and appropriateness of it, for any such pur-

pose as the statute indicates, does not exist in the slightest degree.

We have before remarked that the language giving the right to issue certiorari to this court is identical with that under which the circuit courts issue mandamus; and that, therefore, the decisions as to the authority of those courts to issue that writ are applicable here. In McClung *v.* Silliman, (6 Wheaton, 601,) this court said that, while the circuit court could issue mandamus if necessary to the exercise of a jurisdiction already acquired, it could not do so for the purpose of obtaining jurisdiction. "It cannot be denied that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why was it necessary? Not because that court possesses jurisdiction, but because it does not possess it." (6 Wheat., 601.) That is the precise state of the present case. This court is asked to issue this writ in order to acquire control over a question concerning which it has no jurisdiction; not to exercise jurisdiction merely, but to obtain it.

When used in aid of other process, it is to bring up only *the* record upon which the action of the issuing court has been previously invoked, and upon which its jurisdiction is based and exercised; ordinarily, upon suggestion of diminution or defect in the copy of the record already before the court by writ of error or upon appeal. It has never heretofore been employed to bring up questions which would not be reached by writ of error or upon appeal, even if they arose before the writ of error was sued out or the appeal taken. So, in Tennessee, where it is a substitute for an appeal, the court refused to allow "a substitute for an appeal to be made to effect purposes which the appeal itself never could." (Triggs *v.* Boyce, 4 Hayward, 101, 102.)

It is an attempt to have the Supreme Court pass indirectly upon a question over which it has no direct control. This the court of Missouri declined to do, saying: "Where we are prohibited from acting upon a question on appeal or writ of error, we cannot, upon any just or reasonable principle of construction, take cognizance of it by certiorari." (Britton v. Steber, 62 Mo., 374.) "If the inferior court have jurisdiction and the court above have not, a certiorari cannot be had." 1) Tidd's Practice, 398.)

The principle must be the same, whether the jurisdiction of the inferior court be exclusive as to the whole case, or merely upon some incidental question or interlocutory matter arising in it. Accordingly, this court say, in Fowler *v.* Lindsay, (3 Dallas, 413,) "it is sometimes used as an auxiliary process where, for instance, diminution of the record is alleged on a writ of error [or appeal]; but, in such cases, the superior court must have jurisdiction of *the controversy*." In the preceding paragraph upon the same page, it had been remarked (substantially) that certiorari never issued "to remove a cause merely from a *defect of jurisdiction*." Here, there was no defect of jurisdiction. If there was, the passage just cited shows that certiorari would not be sustained upon that ground. If there was no such defect—as, we presume, must be conceded—then the question was one exclusively within the discretion of the Court of Claims, and not reviewable here by any process. This latter point will be further remarked upon hereinafter.

The closing remark in Crusell's case, (12 Wallace, 176,) was *obiter dictum*, and without consideration of the point.

The constitution of California follows the language of the judiciary act in authorizing the supreme court of

that State to issue "writs and processes necessary to the exercise of its appellate jurisdiction." That court declared that "the issuance of the writ of certiorari presupposed that the jurisdiction of this court to hear and determine the case in which it issued had already fully attached, and it was *only to aid and further the exercise of that jurisdiction, and* NOT TO OBTAIN ANY NEW OR ADDITIONAL AUTHORITY *over the case*, that the writ was directed to issue." (Smith *v.* Oakland, 40 Cal., 482; Wilcox *v.* Oakland, 49 Cal., 31.)

Here the original record is perfect. There is no hint of defect in it, either by omission or addition. What this court ought ultimately to do upon the merits of the cause numbered 119, upon the docket of this term, if the appeal is not withdrawn or dismissed, must be determined upon that record, precisely as it now stands. Therefore, to *that* record and appeal the writ of certiorari now petitioned for could not be auxiliary. That cause desires no aid—needs none. The accident of its still being borne upon the docket has nothing to do with the proper disposition of this application. Had the cause been argued and your *final* judgment rendered therein in behalf of the claimant at this term or at either of the two preceding terms, the Court of Claims could have nullified it by granting a new trial, this court having terminated its connection with the case and become *functus officio* with regard to it. If, then, that court could, without interference, vacate your final judgment and set at naught a mandate actually issued, at any time within two years after it was sent down, it can hardly be ground for interposing before judgment that its action may "tend to the impairment and invalidity of your honor's mandate to be [conjecturally] issued therein."

If auxiliary, and not supervisory, it is only when required for the understanding of such an original record, and to correct errors therein, that certiorari can issue. (3 Dallas, 413; Stewart *v.* Ingle, 9 Wheat., 526; Field *v.* Milburn, 3 Cr., 514; Gregory *v.* Slaughter, 19 Ind., 342; Thatcher *v.* Miller, 11 Mass., 414; Com. *v.* Roby, 12 Pick., 496; Reid *v.* De Wolf, Wright, 418; Andrews *v.* Bosworth, 3 Mass., 223; Com. *v.* New Milford, 4 Mass., 447; Sweet *v.* Overseers, 3 Johns., 23; Scott *v.* Hall, 2 Munf., 229; State *v.* Reid, 1 Dev. & Bat., 382; Brackett *v.* State, 2 Tyler, 152; Gosline *v.* Place, 32 Penn., 520; Harres *v.* Com., 35 Penn., 419.)

The applicant for certiorari cannot obtain it upon the ground that, subsequently to the appeal, there has been an unauthorized alteration of the record below, when his opponent, the appellant, at the time of entering his appeal in the court above, has filed what all parties admit to be a sufficient and perfect copy of the case as it stood when the appeal was claimed.

Certiorari cannot be either a necessary or appropriate writ to bring up *ex post facto* proceedings in the inferior court.

This application does not connect itself, then, with the original record. It cannot do so through the motion to dismiss the appeal, for that was not filed when the application was made. If the motion to dismiss prevails, as we think it must, then the prayer for certiorari, as an auxiliary process, goes with the principal cause to which it is subsidiary. Assuming it to be possible that the motion to dismiss can be overruled, then there is no connection between the record (No. 119) in this court and subsequent irrelevant, inconsequential proceedings in the court below.

The action of the Court of Claims only becomes effective in case it is permittted to resume control of the cause; in which event it all becomes one connected procedure, from the inception of the claim to the ultimate disposition of it there, all of which can be reviewed upon a second appeal, so far as this court, in the exercise of its appellate jurisdiction, has power to revise and correct the action of the court from which the appeal is taken.

III.

It is, in reality, but a continuation of the line of argument we have been pursuing to observe that certiorari, *as a revisory writ*, lies only from a *final judgment*. (Palms *v.* Campau, 11 Mich., 109.)

In some decisions—relating generally, however, to the statutory writ—it is said that certiorari is the proper remedy to correct errors arising in proceedings which, in any stage of them, are not according to the course of the common law; but this does not mean that the correction can be applied during the progress and at any stage of the proceedings. It must be made only after final judgment in the court below. Until that is rendered, it cannot be known whether or not the party complaining of the error or omission will be injured or aggrieved thereby; and this is essential; for upon this process, as well as upon exceptions, the complainant must show that *he is* aggrieved; not that somebody else is, or that he apprehends he possibly may be in the end. (Colden *v.* Botts, 12 Wend., 234.) It is not a bill *quia timet*. The fact that in this particular instance the injury is claimed to result from the delay occasioned by the interlocutory order itself is no answer to the objection.

It cannot be considered in law an injury unless ultimately shown to be wrongful. If, upon a second trial, judgment be rendered against the claimant, (which we confidently anticipate,) he will be shown to have suffered pecuniary loss—not legal injury—by not being able to retain a judgment to which he was not rightfully entitled. This topic of injury to the petitioner will be further examined hereafter.

The supreme court of Ohio said, in Herf *v.* Schultze, (10 Ohio, 223,) that "a writ of certiorari will not be allowed by the supreme court *until the case is finally disposed of in the court below*, and a writ of error can only be issued after final judgment;" of course to reverse or quash it on account of some error in the proceedings upon which such judgment is based.

"The writ of certiorari is a writ of review. Its office is to bring up for review *final* [italicized in the original] determinations and adjudications of inferior tribunals, boards, or officers exercising judicial functions, when there is no appeal nor any plain, speedy, and adequate remedy. The writ is necessarily founded on a final determination." (People *v.* Co. Judge, 40 Cal., 480.)

The supreme court of New Jersey, in State *v.* Dist. Med. Soc., (35 N. J. Law, 202,) ruled the same way, in 1871, saying, "There is no power of the supreme court, by virtue of the common-law writ of certiorari, to review the *final* adjudications of special statutory tribunals, which act in a summary way, different from the course of the common law. [Citing cases.] There is no power in this court to continue or complete the proceeding which has been instituted in the special tribunal created by positive law. The question to be tried cannot be withdrawn from that forum, nor can it be denied

the right to terminate the proceedings which have been initiated before it. The only legitimate use of a certiorari is to subject to review in this court the *final* decision of the inferior jurisdiction. *If parties are permitted to invoke its aid at any time during the progress of their cause, it would lead to consequences which are inadmissible. If the writ may go before judgment, it may go at any and every stage of the case. At every single step in the cause, it might be certified into this court, and when a final determination was reached in the tribunal below, after this court had adjudicated the various questions which might be started, and after delay almost interminable, the case would be subject again to review after such final judgment.* The authorities are against the use of the common-law writ of certiorari before judgment, *in cases which cannot be continued or terminated in the court above.*" (35 N. J. Law, 201, 202.) The case then goes on to refer to, and state the substance of, pertinent cases, English and American. It cites Rex *v.* Nicolls, 2 Strange, 1227; Groenwelt *v.* Burwell, 1 Salk., 144; Lynde *v.* Noble, 20 Johns., 83; People *v.* Supervisors, 43 Barb., 237.

Gibson, when C. J. of Pennsylvania in 1847, said, "A certiorari is a writ, doubtless, of very extensive application, and *this court has all the revisory powers of the King's Bench over inferior jurisdictions;* but it has not been shown, nor can it be, that when a special jurisdiction has been created by statute, that court can snatch it from the hands of the magistrates to whom it has been given, and exercise it in their place. That would be an act of usurpation. Its power in such a case is purely correctional, and so is the power of this court. Where, indeed, a superior court has concurrent jurisdiction, it may issue its certiorari to remove an action, or an in-

dictment, or any other matter determinable according to the course of the common law, and *proceed in the cause returned as the inferior court would have done;* but where a proceeding is according to a course provided by statute, a certiorari lies to remove it into the King's Bench *only after judgment* and *for the purposes of revision* as to regularity," (Com. *v.* Nathans, 5 Penn., 135,) where the learned chief-justice goes on to show, as the New Jersey court did, the absurdity of attempting any interference, for revisory purposes, before judgment.

"By the English practice, *after judgment* has been rendered by an inferior court, the common-law writ of certiorari is allowed for the purpose of ascertaining whether it appears from the record that the inferior court had no jurisdiction, or had proceeded illegally in the cause." (Chicago *v.* Whipple, 22 Ill., 107.)

Whenever there is an indication either way, in any reported case, by quotation from the application or otherwise, it will be found that the petition recites the rendition of a judgment alleged to be based upon erroneous proceedings. (Brockett *v.* State, 2 Tyler, 152; Burr *v.* Waterman, 2 Cow., 38, note; Ruhlman *v.* Com., 5 Binney, 27; Phillips *v.* Phillips, 3 Halstd., (8 N. J. Law,) 123; Burrows *v.* Vandevier, 3 Ohio, 383; and reported cases *passim.*)

Where it is the right and duty of the superior court to *proceed* in the cause, to hear and determine it upon the merits, the writ should issue *before* judgment; but *as a revisory writ*, or to bring up a completed record, on suggestion of defect or diminution, it must issue only after judgment.

"A writ of certiorari, when not used as ancillary to another process, is *in the nature of a writ of error*, ad-

dressed to an inferior court or tribunal whose procedure is not according to the course of the common law." (Farmington *v.* Co. Commrs., 112 Mass., 212.) Consequently it does not generally lie *as a revisory writ*, where there is a right to a writ of error or to an appeal. If this will not give the applicant relief from the injury complained of, it is the fault of the law, or rather an inevitable incident of litigation, which requires whatever delay may become necessary for due deliberation and a correct conclusion. It is like a case where the court "go wrong upon the evidence. It is the misfortune of the parties." (Birdsall *v.* Phillips, 17 Wend., 468.) "If this [certiorari] will give him no adequate redress of any grievance which he may have sustained, it is the fault of the law and not of the court. It is like many other cases depending upon the discretion of courts of limited and special jurisdiction." (Gibbs, pet. for cert., *v.* Co. Co mrs., 19 Pick., 299.)

IV.

Even as a revisory writ certiorari never issues to control or review the exercise of discretionary power confided to the inferior tribunal. "The soundness of the discretion exercised is not a subject of review on certiorari." (Borough of Sewickley, 2 Grant's Cas., 135; Pratt *v.* Kittrell, 4 Dev., 168; Raleigh *v.* Kane, 4 Jones, (Law,) 291; People *v.* Police Commrs., 14 Sup. Ct. N. Y., (7 Hun.,) 231.) "No judicial officer, in determining a matter legally submitted to his discretion, can be required to be governed by the dictates of any judgment but his own." (Gibbs, pet. for cer., *v.* Co. Commrs., 19 Pick., 299, citing Chase *v.* Blackstone Co., 10 Pick., 244,

and U. S. *v.* Lawrence, 3 Dallas, 42.) "Exceptions to the merits of the inquisition being addressed, as they are, *like a motion for a new trial*, to the discretion of the judge, are determinable by him exclusively." (Union Canal Co. *v.* Keiser, 7 Harris, 137.) "The motion for a new trial has never before been brought to this court on a division of opinion in the circuit court. It had been decided that a writ of error could not be sustained to any opinion on such motion, and the reasons for that decision seemed entitled to great weight, when urged against determining such a motion in this court when the judges at the circuit court were divided on it. * * Such a motion is not part of the proceedings in the cause. It is an application to the discretion of the court, founded on evidence which the court has heard, and which may make an impression not always to be communicated by a statement of that evidence." (U. S. *v.* Daniel, 6 Wheaton, 547, 548.)

It is immaterial by what particular form of precept the attempt is made to bring such questions, discretionary with the court below, to the attention of the Supreme Court. It is the nature of the subject which precludes inquiry here. "It has been assigned for error that the court gave to the plaintiff the opening and close of the argument to the jury. * * * But if he was not entitled to it, the decision of the court awarding it to him is *not a subject* that will be reviewed here; * * and the motion to grant a new trial is not assignable in error, as we have often said heretofore." (Hall *v.* Weare, 92 U. S., 732, bottom; Baker *v.* White, *Id.*, 176; Macomb *v.* Knox Co., 91 U. S., 1; Parcels *v.* Johnson, 20 Wallace, 653.)

"*However erroneous the order of a county court granting a new trial may be, it cannot be brought up for review by a writ of certiorari.*" (Yenawine *v.* Richter, 43 Cal., 312, 314, *qu. vid.*)

It will be proper to examine a little the nature and extent of the discretion confided to the Court of Claims over the subject of new trials therein. This tribunal was established as the means of informing the conscience of the sovereign what ought to be done in any given case. It is the only method by which the Government can be sued. It can be there sued only *sub modo*, under the circumstances and to the extent indicated by the statute. (*Ex. p.* Russell, 13 Wallace, 668.) This provision, such as it is, is more liberal than that made by any other government. Whoever avails himself of it takes it *cum onere*. "*Qui sentit commodum sentire debet et onus.*" The claimant institutes proceedings, knowing that he will not have the advantage of a jury trial, of oral testimony, of any appeal from the court's findings of fact. He must know, too, that his judgment, if one be rendered in his favor, is liable to be reversed upon appeal, and that the Court of Claims may, *suo motu* or otherwise, set it aside and order a new trial. This is one of the contingencies to which the litigation upon which he enters is subject.

The extent to which discretion is given the Court of Claims to award a new trial must be noticed. It is determined by reference to R. S., Secs. 1087 and 1088, printed at the commencement of this brief. Complaint was made below, upon the argument of the motion for a new trial, and will perhaps be repeated here, that Con-

gress had given to the United States a preference or advantage over the claimant in this matter of granting new trials. The cogent reasons for doing so are forcibly stated in *Ex p.* Russell, (13 Wallace, 668,) where it is said that "The section in question was undoubtedly *intended to give the Government an advantage*," &c. It is not a peculiarity of our laws to give such apparent advantage to the Government. The necessity for it is perceived under every form of administration. An illustration of it, with reference to the very process under discussion, is found in the statement of the English authorities that *certiorari* issues as a matter of course and of right at the demand of the King's Attorney General, and is peremptorily refused when objected to by him. (Huse *v.* Grimes, 2 N. H., 210; Duggan *v.* McGruder, 1 Walker, 112; Munro *v.* Baker, 6 Cow., 396, where the same doctrine is extended to the people in their sovereign capacity.)

First, then, let us see what is the right of a claimant to a new trial under R. S., Sec. 1087. He may have a new trial "*for any reason* which, by the rules of common law or *chancery* * * * * would furnish sufficient ground for granting a new trial." Our motion for a new trial was contested below, and a review of the action had upon it is invoked here, upon the strictest application of an asserted principle of common-law practice, that it was vitally essential for the motor to show that he not only did not know of the evidence now proposed to be offered, but that he could not have discovered it by the use of ordinary diligence. There is no such inflexible principle of law. In exercising its discretion, the court usually gives great weight to this consideration; but

the only vital controlling question is, "Does *justice* require a revision of this case?" (White *v.* Trinity Church, 5 Conn., 588, quoted *infra.*) It is to attain justice that courts are established, juries empanneled, and all the machinery of the law put in motion. So far and so often as it fails to achieve this result, the judicial system fails of its purpose. Generally, it may be that the ends of justice will be best subserved by the exaction of due diligence; but if a case be shown in which blind submission to this requirement would cause greater injury and injustice than to disregard it, it will not be held conclusive against a new trial. So ruled in Georgia, in 1831. "In general the objection would be insuperable, but in the present instance we are inclined to think that it is outweighed by the strong considerations in favor of a new trial, which are to be found in *the general character of the case.*" (Irwin *v.* Morell, Dudley, 80.) That court then quotes the language of Denison, J., as found in 1 Burr, 397: "The granting a new trial, or refusing it, must depend upon the legal discretion of the court, *guided by the nature and circumstances of the particular case,* and directed with a view to the attainment of justice."

"Facts insufficient in themselves may strengthen the claim to a new trial, founded on the evidence on which the jury decided." (Withers *v.* Butts, 7 Dana, 329.)

Commenting upon this last-cited case, Mr. Waterman observes: "The principle involved in the foregoing case is one of frequent and familiar application. Courts, in the exercise of their discretionary powers, though they may not be induced to interpose from any one of a number of considerations taken singly, may be induced to do so by them collectively. In preparing for motions of

this nature, this should be borne in mind; and no claim on the ear of the court be omitted, because it is in itself insufficient. For notwithstanding it may be such as, if standing alone, the court would wholly disregard, it may, when taken in connection with other considerations, so strengthen the equities of the case as to cause the application to be granted." (3 Graham & Waterman on New Trials, 1104, 1105, ch. XII, § 3.)

"6. Notwithstanding the general rules on the subject above stated, it is said to be difficult to draw a line as to the granting of a new trial; and perhaps the granting or not granting of it *must always depend upon the circumstances of the case*," [as it rests in discretion.] * * * "An infinite variety of considerations, which *can never be brought to the test of strict rule*, and which must be referred to the discretion of the judge, are the basis of determination." (Hilliard on New Trials, 5, ch. 1, § 6.)

Hosmer, C. J., in White *v.* Trinity Church, (5 Conn., 188,) observes: "A petition for a new trial is an application to the discretion of the court, and *incapable of being reduced to the standard of fixed and certain rules.* The granting or refusing of it is *absolutely in the breast of the court.*" He cites English cases and quotes from Bright *v.* Eynon, (1 Burr., 390,) to the effect that the legal discretion of the court is to be "guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice." He then states the elements for forming a judgment upon the motion, the value in controversy, the nature of the right; "and, indeed, an infinite variety of considerations, *which can never be brought to the test of strict rule*," &c. Numerous citations are made in the note to this case in the second edition of these reports.

Even where the rule is applied, it is confined to testimony itself known to the moving party, or which he might have known had he used due diligence. It does not extend to his knowledge of circumstances or documents which, if investigated, and the indications thus developed pursued, would probably (as subsequent events tend to show) have led to the discovery of the evidence sought to be introduced by means of a new trial. "We are satisfied that the newly discovered evidence was not known at the time of the trial, although the defendant's counsel, upon seeing the New York commission, which only came to hand a few days before the trial, suspected, from some parts of it, that some useful information might be collected." (Marshall *v.* Union Ins. Co., 2 Wash., 412.)

But the claimant's right to a new trial is not to be determined or restricted by the mere rules of law. It may be granted conformably to *chancery* practice. The rule there is simply *the satisfaction of the chancellor's conscience.* In 2 Smith's Ch. [85] it is said: "Even if a verdict be not against the evidence, if the judge is not satisfied with it, he is at liberty to grant a new trial, for his conscience must be satisfied. (Faulconberg *v.* Pierce, Amb., 210.) A new trial of an issue was granted, the verdict being unsatisfactory from the circumstances under which the jury rendered it." (East Ind. Co. *v.* Bazett, Jacobs, 91.)

"One issue is not necessarily conclusive, for if the conscience of the court be not satisfied by the result, it will send the question back to law, though generally to another tribunal. (Treat *v.* Henning, 10 Vesey, 495.)

In the instance, however, of an action upon a legal title this court will not, it appears, conclude the parties upon one trial, (citing several cases;) * * * and it is particularly to be remarked that three successive trials of an issue have *frequently* been directed, and that even a fourth has been granted." (Jeremy's Eq. Jur., 299, citing cases.)

"As the whole proceeding takes place solely for the purpose of informing the conscience of the court, and is not conclusive, the court, in directing it, is not strictly bound down to the forms and incidents of a regular trial. * * * The standard itself being so vague as the satisfaction of the conscience of the individual judge who has directed the issue, the rules for granting a new trial are extremely indefinite. He will often, almost arbitrarily, (perhaps on a suspicion which he has formed that a witness has been perjuring himself,) send it back to another jury, or even decide in the teeth of the verdict." (Gresley's Eq. Ev., 527, 528.)

The reporter's head-note of the case of Stace *v.* Mabbot, 2 Ves., 552, is thus italicized: "Courts of equity are much less strict in granting new trials than courts of law; *it being necessary, not* that the question should be decided *to the satisfaction of others, though ever so often*, but that *the conscience of the court itself should be quite satisfied.*" The Lord Chancellor Hardwicke thus commences his opinion: "If this had been an application for a new trial in a court of common law, in the ordinary course of proceedings there, I believe that it is not such a case that it would be granted; for they hold these motions for new trials by pretty strict rules," (which he then partially noticed;) "but this court directs issues to be tried at law to inform the conscience of the court as to facts doubtful before; and therefore expects in return

such a verdict *and on such a case as shall satisfy the conscience of the court to found a decree upon;* if, therefore, upon *any* material and weighty reason, the verdict is not such as to satisfy the court to found a decree upon, there are several cases in which this court has directed a new trial for further satisfaction, notwithstanding it would not be granted in a court of common law," etc., etc. (*Id.*, 553.)

If, then, the Court of Claims, conformably to chancery practice, may grant the claimant a new trial, simply because, upon a review of the subject, it (representing the national conscience) is not satisfied with the result previously reached, and if the purpose of section 1088 is, as declared in 13 Wall., 668, to give the United States, for reasons there indicated, an advantage; *a fortiori*, should a new trial be granted upon the application of the Government if the court becomes dissatisfied with the judgment before rendered, either as wrong in itself or because it is not based upon or accompanied by such a statement of all the essential facts necessary to present the whole merits of the case requisite for a fair consideration and determination of the important legal principles involved.

The purpose of every judicial process is the attainment of justice. "Even within the range of cases to which this writ is thus applicable, it is not strictly a matter of right, but the granting of it is a matter of discretion, to be governed by the consideration *how far the ends of justice and the public interests* may require it." (1 Monell's Practice, 267, citing cases.)

We do not hereby understand the mere pecuniary public interest, though this is large, and affords ground for cautious deliberation in coming to a conclusion. (The

Rendsborg, 4 C. Rob., 122.) The amount of money in contest, however considerable, is only of present and transitory importance; but great principles of international and constitutional law are involved. Shall these be discussed and determined upon *all* the facts pertaining to them, as the Court of Claims now propose? Or shall the wise discretion of this court overrule that of the lower tribunal, and again exclude those facts which are most important, most essential, most vital? "We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right." (The Legal Tender Cases, 12 Wallace, 554.)

But Collie will say he ought not to be made the victim of a desire to settle these questions, however grave and important abstractly or in their results. That which interests him is so many shekels of gold and silver, and he wishes us to look at no other object than that which has dazzled his eyes. But, as his distinguished counsel wisely and pithily observed on the great impeachment trial, it is necessarily always at the expense of some individual that great constitutional questions are presented and decided. "Constitutions are framed; laws established; institutions built up; the processes of society go on, until at length, by some opposing, some competing, some contending forces in the state, an individual is brought into the point of collision, and the clouds, surcharged with the great forces of the public welfare, burst over his head." (2 Impeachment of Andrew Johnson, 269.) As noticed below, Collie voluntarily engaged in a business likely to raise these questions, with the delay and hazard incident to their decision.

Examined in the light of the cases exhibiting the un-

limited power to award new trials in chancery, and that it is practically without limit at law, it becomes apparent that the petitioner places too restricted a meaning upon the clause of R. S., sec. 1088, which authorizes a new trial upon any evidence which satisfies the court that wrong or injustice has been done to the United States by its decision. He makes "wrong or injustice" synonymous with the preceding word "fraud," and then contends that it must necessarily mean some fraudulent act of the claimant. We do not so understand. Its purpose is to give relief whenever the court is satisfied, from any evidence, that *its decision*, however obtained, wrongs or does injustice to the United States. Every word in the statute is to be given some, its appropriate, meaning. "Wrong or injustice" embraces a wider area than "fraud;" and "injustice" applies to a different state of things than "wrong," in the connection in which these terms are employed. It may appear to the court that their decision was legally correct upon the facts presented on the motion for a new trial, taken with those originally proved; yet, under the peculiar system of administration in that court, it may be thought obviously unjust that these additional facts should not be brought upon the record and to the attention of this court for its determination, whether or no they affect the correct legal result of the litigation.

In the course of judicial administration, justice is always sought to be attained by the application of legal principles to proven or admitted facts. In the prescribed course of procedure, in cases like Collie's, the facts are *conclusively* found by one tribunal, only the law applicable thereto being the subject of revision in an-

other. The findings of fact of the Court of Claims are the only light by which you are to be guided in your search for the correct legal principles to be applied to the cause. If by accident, oversight, or human frailty, facts are omitted, or are inaccurately stated, and thereby a false light or dense obscurity is cast upon the subject, there is no remedy unless the Court of Claims can afford it under this statute. If, through any inadvertence of theirs, the light of knowledge is shut out of a case, or darkened, or colored, or refracted, or extinguished, the corrective must also be found there, if anywhere. "There is *nowhere else* on earth the Promethean heat which can that light relume." A similar remedy exists in every other tribunal for the trial of facts. Every member of this court has applied it upon his circuit by granting a new trial when satisfied that a mistake of his own has wrought injustice. Suppose, in the original case, it had been shown that Collie had given guns and protected Confederate ships with false flags, fabricated papers, and perjurious oaths, but the Court of Claims had inadvertently overlooked the evidence, or misconceived its force, and therefore refused so to find, (as not warranted by the testimony;) if subsequent discussion, upon the motion for a new trial, called their attention to the testimony so overlooked, or led to a true conception of its bearing and importance, could they not correct this error, and the consequent wrong and injustice, that could be reached in no other way? This is used merely as an illustration. Suppose any other error of fact upon the part of that tribunal, and the result is the same. There is no other place or method for preventing wrong or injustice arising from the exclusion of additional facts which, in the judgment of that court or this, may affect the result, and

which the court below at first erroneously refused to find as established by the evidence.

Where the superior tribunal possesses a revisory authority over inferior jurisdictions, its interference is only to restrain the latter within proper limits; not to correct their actions, even if erroneous, within those limits. It is to remedy any act in *excess* of jurisdiction, not in the exercise of it. (Reynolds *v.* San Joaquin Co., 47 Cal., 604; Bennett *v.* Wallace, 43 Cal., 25; Central Pac. R. R. Co. *v.* Placer Co., *Id.*, 365, and 46 Cal., 667, 670; Morley *v.* Elkins, 37 Cal., 457; People *v.* Turner, 1 Cal., 152; People *v.* Elkins, 40 Cal., 647; Tallmadge *v.* Potter, 12 Wisc., 317; Balzar *v.* Lasch, 28 Wisc., 270; Frederic *v.* Clark, 5 Wisc., 191; Hauser *v.* State, 33 Wisc., 680, 681; Journeay *v.* Brown, 26 N. J., (Law,) 111; People *v.* Frederics, 48 Barb., 173; Doolittle *v.* Galena, 14 Illinois, 381; Chicago *v.* Whipple, 22 Ill., 105; Borough of Sewickley, 2 Grant's Cas., 135; Dow *v.* True, 19 Maine, 46.)

As stated in the foregoing (and a multitude of other) cases, findings of fact and determinations of law will not be reviewed to ascertain whether they are correct or erroneous, if the court had jurisdiction to make them. (Cent. Pac. R. R. Co. *v.* Placer Co., 43 Cal., 368, cited above, and, more fully, *infra;* Derry *v.* Brown, 13 Penn., 389; Farmington *v.* Co. Commrs., 112 Mass., 212; *In re* Sheppard's election, 77 Penn., 301.)

"The matter is there when the proper plaint, process, and person are before them. If they go wrong upon the evidence, it is the misfortune of the parties." (Phillips *v.* Birdsall, 17 Wend., 468.)

"The county court did not exceed its jurisdiction in granting the defendant's motion for a new trial. It had

rendered judgment in the case, and had jurisdiction both of the subject-matter and of the parties. * * * * If courts grant new trials in disregard of statutory methods of procedure, it is error; but *it cannot be said that for that reason there is a want of jurisdiction*, and that their orders are, therefore, void. In this case the order of the county court granting a new trial was *clearly erroneous*. * * * * But *however erroneous the order may have been, it cannot be brought up for review by a writ of certiorari.*" (Yendawine *v.* Richter, 43 Cal., 313, 314.)

V.

Even where there has been such error upon the part of the court below as invalidates its proceedings, the supervisory court will not, necessarily, for that reason, order the writ of certiorari to issue. It then becomes discretionary whether to issue it or not, as justice and the public interests may require. (Monell's Prac., 267, and cases cited; Bath *v.* Magoun, 8 Maine, 293; *Ex p.* Waterville, 31 Maine, 506; Hopkins *v.* Fogler, 60 Maine, 268; Lees *v.* Childs, 17 Mass., 352; Huse *v.* Grimes, 2 N. H., 210; Munro *v.* Baker, 6 Cow., 396; People *v.* Supervisors, 15 Wend., 198; People *v.* Mayor, 2 Hill, 9; *Re* Mt. Morris Sq., *id.*, 14; People *v.* New York, 5 Barb., 43; Rockingham *v.* Westminster, 24 Vt., 288; Duggan *v.* McGruder, 1 Walker, 112; Keys *v.* Marin Co., 42 Cal., 252; People *v.* Utica, 65 Barb., 22; People *v.* Brooklyn, 15 Sup. Ct., N. Y., (8 Hun.,) 57; People *v.* Rochester, 21 Barb., 664; Rutland *v.* Worcester, 20 Pick., 71; Gleason *v.* Soper, 24 Pick., 184.) Citations are unnecessary to support so elementary a proposition.

It is referred to only as preliminary to calling attention to the grounds upon which the writ is here sought, as showing that, if authorized, no interference is demanded by the merits of the case.

Let us examine consecutively the allegations of the petition. It avers that Young's right, as assignee, accrued after judgment rendered in the Court of Claims. If so, it was still merely a transfer of such interest as Collie had, liable to be lost or defeated by the same contingencies as before it was assigned. The assignee for value of a judgment takes it subject to all the liabilities and defenses that existed against it in the hands of his assignor. (Seltz *v.* Unna, 6 Wallace, 327–337, and cases cited on pages 329 and 336.) Young succeeds to Collie's rights with notice of the infirmity of the claim. Many of Collie's creditors are so by reason of having aided him in these very adventures.

The petition then recites that Collie was domiciled in England during our civil war and became owner of cotton captured with the City of Savannah, worth about three millions of dollars, although the net proceeds in the United States Treasury were but $952,076.71; that he made claim for these proceeds under the captured and abandoned property acts, but suspended proceedings in order to try and obtain the full value of the cotton through the mixed commission; that his suit was thus delayed nearly eight years; that, after a refusal by the commission to hear the case, for want of jurisdiction, he resumed action in the Court of Claims; that, when claimant's proof was all taken, the Attorney-General had what proved to be four months' notice of the

facts relied upon to support the petition; that the Government's counsel said he wished to prove certain facts indicated in documents found in the rebel archives, which had been separated, assorted, and collected, and related to Collie's acts during the war; that Collie's attorney examined these papers, which had been arranged to be used, if competent, before the mixed commission, and had been certified by the Secretary of War for that purpose, and had been printed and put in evidence before that tribunal more than eight months before the trial in the Court of Claims; that the claimant's attorney was notified that the United States would claim a continuance unless these documents were admitted, or it was admitted that Collie ran the blockade with material of war; that Collie's counsel would admit that his client ran the blockade, and nothing more; and if more was insisted upon, the defendants must obtain their continuance, if they could, to bring in such proof as they might be able; that the representative of the Government accepted the stipulation offered, and set up such running of the blockade to defeat the claim, but judgment for $952,076.71 was rendered in favor of Collie; that the printed documents aforesaid consisted of letters to and from Collie "OR *copies thereof*," contracts signed by him, bills of lading or manifests of blockade-running vessels, &c., which *tended* to show that Collie carried on a very extensive trade with the States in rebellion, including the shipment to officials or agents of the insurrectionary States of material contraband of war, the present of a battery of Whitworth guns to the State of North Carolina, "and a receipt from a rebel quartermaster for the consideration upon sale of a blockade-running steamer; that *some of these documents were*

originals and some of them were certified copies; that *most* of the persons who had written or signed the said documents, OR who were *indicated* as having full knowledge of the matters referred to therein, were persons then and now of great prominence, and within reach of the Court of Claims by subpœna, commission, or other writ of process; that the said documents *either* contained a full history of the transactions of the claimant above mentioned, OR *referred to them* in such a manner as to give the easiest access to the minutest particulars thereof and the names of the persons by whom the same could be proven; that the said documents and the facts *indicated* therein were *thus* fully under the notice and within the knowledge of the counsel for Government who tried the cause in the Court of Claims before and at the time of said trial, and that the introduction or non-introduction of the same in evidence upon such trial was subject of consideration and deliberation of such counsel." (Petition for cert., 6, 7.)

Without wishing to be offensive, we feel compelled to observe that these statements show the petition to have been prepared with much more ingenuity than candor. This will be quite apparent if we are permitted to refer to the compilation of documents to which it alludes. It does appear (bottom of page 4 of petition) that they were only "certified" by our Secretary of War. It is significant that, after a careful examination of them, claimants' counsel did not believe they contained enough to enable the Government even to obtain a continuance; and that he refused to admit any thing beyond the bare fact that Collie ran the blockade with goods "*not* munitions of war." If the compendium itself contained proof

to the contrary and of other facts, the proposal of and acquiescence in such a limited stipulation can hardly be honestly explained, except at the expense of intelligence. But this petition virtually concedes the real truth, that this pamphlet in fact contained no evidence whatever; and that was why only such small concession was made to avoid an application for delay. Upon page 6 of this petition, referring to this publication, the petitioner says "that *some* of these documents were originals, and *some* of them were *certified* copies." *What original* documents did that book contain? *By whom* were the copies *certified?* The averment itself warrants us in saying that *no original at all affecting the questions presented* by the evidence adduced in support of the motion for a new trial could be found in that book; and that it contained no copy *so* certified as to make it evidence. The whole was merely certified by our Secretary of War as *copies from the rebel archives of what purported to be copies* of original documents, largely between persons disconnected from Collie. This is evident from the next statement of the petition, near the bottom of page 6, "that *most* of the persons who had written or signed the said documents, OR who were *indicated* as having full knowledge of the matters referred to therein, were persons then and now of great prominence, and within reach of the Court of Claims by subpœna, *commission*, or other writ of process." Every person this side the grave is legally "within reach of the Court of Claims" to this extent. The petition goes on to state that the facts were referred to "in such a manner" as to *indicate* how they could be proved. It does not give any accurate idea of their contents. To whom would the indications be so manifest? Very probably they might seem so to

Collie or his counsel, apprehensive of discovery, while they would merely (at best) raise a faint suspicion in the minds of those having no further means of information; or if the suspicion were vehement, would give no clew to an outsider whereby he could verify them. In Childs's case, (6 Court of Claims, 49,) relied upon below, it appeared that the very evidence itself was in the hands of counsel and needed "only his own act to produce it;" whereas a mere suspicion that it may be found will not prevent a new trial. (Marshall *v.* Union Ins. Co., 2 Wash., 412.)

The petition, after stating the appeal and subsequent action in this court, next states (page 8) the filing of the motion for a new trial, and the citizenship of the affiants by whose testimony it was supported, who are said to have had no previous connection with the case, and no knowledge of prior proceedings in the cause; that no affidavit of the attorney-general, or of any subordinate connected with the first trial, was filed; but that the affidavits and exhibits set forth only the same facts *indicated* by the documents aforesaid. We will here interpose the remark that it is thus conceded that the affidavits, &c., in aid of the motion did not consist of a recital of the pamphlet above mentioned, but were verifications of what Collie now says was *indicated* by that pamphlet. What certain statements *indicate*, beyond what they positively affirm, is too conjectural a basis upon which to ask the reversal of the discretionary action of a court.

The petitioner proceeds (near the top of page 9) to inform this court what (in his view) is "the full legal scope, purpose, and intention" of the statute permitting

a new trial, which he says "must be upon a new case made," showing that "fraud, wrong, or injustice" has been *practiced* upon the United States in *obtaining* the judgment, &c. Evidently the statute just as it reads does not suit his purpose; he wishes to amend before applying it. He then declares (page 9) that the Court of Claims "outside of and beyond the power conferred upon them by said statute arbitrarily, and *by usurpation of jurisdiction* and authority, entertained said motion, and has in fact ordered a new trial in said cause."

This statement shows either a strange confusion of ideas or else a desire to confuse them. It tacitly recognizes the well-established principle before adverted to, that for any errors of law or fact *within* the jurisdiction of an inferior court *certiorari* affords no remedy.

Therefore, here, for the first time, and not in the court below, it suggests an "usurpation of jurisdiction." How can this be said to exist? A motion for a new trial was made, which "purported to be filed under and in pursuance of the act of Congress approved June 25, 1868," (page 7, last two lines.) The Court of Claims either had no power to consider the, motion at all, or (if considered) could determine it in either way. Counsel will hardly say the Court of Claims could not have overruled that motion. To have examined the supporting affidavits, and rejected it on account of the defects now suggested, would have been a determination upon the merits. To argue that it was within the legal competency and discretion of the court to decide the motion in one way, and an arbitrary "usurpation of jurisdiction" to decide it the other, is an absurdity that would not be thought worthy of notice but for the sanction of the great name appended to the petitioner's brief. *Stat nominis umbra.*

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We doubt if it has the approbation of his judgment. "'Tis Jacob's voice, but the hand is the hand of Esau."

"Jurisdiction is the power to hear and determine—this is its general definition. Jurisdiction, as applied to a particular claim or controversy, is the power to hear and determine that controversy. The mere grounds upon which the determination is reached may or may not be correct in themselves. *These may be supported by evidence inadmissible when tested by the rules governing the introduction of evidence.* The reasons given for the conclusion arrived at may or may not be such as address themselves to the judgment of others; but erroneous views entertained, or incorrect reasons assigned, *or evidence erroneously admitted*, in deciding the controversy, do not make a case of want of jurisdiction. * * * * The company now come here to say that in arriving at that particular judgment the Board exceeded its powers. The proposition then is, that if a question of valuation be brought before the Board, and it determined it one way—that is, reduce the valuation—then it is a determination within its jurisdiction to make; but if it determine it the other way—that is, refuse to make the reduction—then such determination is one without the lawful jurisdiction of the board to make. But the conclusive answer to this is, that jurisdiction *over a question* being conceded, *carries with it necessarily the authority*, the mere power, *to decide the question either way;* that to hold that there was jurisdiction to decide in only one way, and not in the other, is to say that there was in reality no question before the board at all. It is to dictate the determination in advance." (Cent. Pac. R. R. Co., pet'rs for cert., *v.* Placer Co., 43 Cal., 368, 369.)

We repeat that the constitution of California adopts the language of the judiciary act as to the right to issue the writ. That the petitioner contested the motion upon its merits, and introduced testimony which he thinks "showed affirmatively" the propositions for which he now contends, is apparent from the paragraph near the top of page 10. His averment in the next preceding paragraph (pp. 9, 10) that *ex parte* affidavits, and not depositions, were introduced in support of the motion, is fully answered by the foregoing citation from 43 Cal., 368. The course pursued was in accordance with practice and authority. If *certiorari* does not bring up the evidence itself, certainly the question of its nature and admissibility cannot thus be presented. (People *v.* Barton, 6 Howard, Prac., 25; Stone *v.* Mayor, 25 Wend., 157, 182; Borough *v.* Quakertown, 3 Grant's Cas., 203.)

"And your petitioner further shows unto your honors that in the class of cases, of which this is one, arising under the captured and abandoned property act of 12th March, 1863, the judgments of the Court of Claims have been understood and construed to be judgments against a special fund, the proceeds of the property sued for in each case, and as the amount held in the Treasury to respond to such judgments is limited by the sum received, *interest* has not been allowed upon such judgments," (pp. 10, 11.) He then states a loss of interest by the delay consequent upon a new trial, and by that already suffered, and concludes with an averment that these matters "tend to abridge, impair, and oust the jurisdiction of your honors in the said cause now of record in your court," &c., (p. 11;) wherefore he prays for certiorari *that the proceedings may be reviewed*, and the order for a new trial vacated.

If it is ever proper to order the certification of a record merely upon the showing made in the petition for it—thereby, perhaps, causing the proceedings to be quashed for some insignificant omission not mentioned in the petition, even though the petitioner's allegations are found not to be sustained—the present application does not allege facts sufficient, even if accepted as true, to justify the issue of the writ. It states as the foundation of Collie's claim that, during our civil war, he engaged so largely in the running of our blockade with supplies, military and other, that, in addition to the numerous cargoes he must have exported in the vessels which run in his merchandise, he had cotton of the value of $3,000,000 still awaiting shipment at the single port of Savannah at the time of its capture. It gives this court a faint idea of the extent to which he aided the rebellion by exchanging the manufactures of the mills, shops, and founderies of England for that staple, which caused and supported the war. Concede, if you please, that this may not be a breach of international law; yet, when, in connection with it, acts are shown which are clearly infractions of it, it is reason enough for refusing the *discretionary* interference of this court to relieve the claimant from the natural consequences of his conduct. He knew the necessities and hazards of the business before he engaged in it. Animated by an inordinate thirst for unbounded wealth, he invested in these dangerous enterprises the vast means he already possessed. To add a few more pounds sterling to an enormous pile, he hastened to aid in the ruin of a friendly republic, in the wreck of liberty and peace, and in the destruction of the hopes of millions. When he undertook this, he gave his previous accumulations as hostages to fortune. He then contracted with fate to meet every evil that might

ensue, whether inflicted in the shape of a direct punishment or *following as a collateral consequence*, and has no right to complain that the hazard of the die has gone against him. He knew he must dread the opposition and elude the vigilance of our Government if he would succeed; that it was especially the chances of our legislative and *judicial* action which he must escape, by perjury or otherwise. It was a business which must, almost inevitably, depend for success largely upon falsehood and perjury. The Government asserts that, to protect his ill-gotten gains he and his agents resorted to the refuge of lies in the testimony by which his cause was originally supported in the Court of Claims, and we wish not to lose the opportunity of establishing this position.

The special injury which the petitioner apprehends is the loss of *interest* upon this $952,076.71, in case he ultimately recovers judgment. The eight years' delay, up to the time he brought his case to a hearing in the court below, was his own voluntary act, while he was trying his luck before another tribunal. Although the aggregate amount of interest makes a round figure, it is large only because of the enormous sum which Collie used for our injury and to the aid and comfort of our enemies. It is only *pro rata*, the same in proportion to its principal as in all other cases. This circumstance of a consequent loss of interest was obvious and well known to Congress when it allowed a new trial at any time within two years from final judgment. It must evidently apply to every cause in which a new trial is granted. In similar cases the common law did not award interest. (3 Chitty's Com. Law, 310.) And the statute adopts this rule. (R. S., sect. 1091.)

VI.

Whether or not new testimony was contained in the supporting affidavits, and whether the testimony, cumulative or otherwise, *ought* to have satisfied the Court of Claims that fraud, wrong, or injustice had been done the United States, can only be ascertained (if at all) by a review of *all* the evidence and a comparison of the new with the old. Whether or not the Government's attorney, at the first trial, knew what is now set out in the affidavits, can likewise only be known by comparing the documents printed and filed with the Mixed Commission with the affidavits. Upon such an examination the superior court never enters, and the fact of its necessity is sufficient to require a denial of the writ. (Starr *v.* Rochester, 5 Wend., 564; *Ex p.* Howard, 10 Pick., 358; *Ex p.* Nightingale, *id.*, 168; Gibbs *v.* Hampden, 19 Pick., 298; Baldwin *v.* Simmons, 9 N. J. Law, 196; Clark *v.* Hall, 11 N. J. Law, 78; Graecen *v.* Allen, 14 N. J. Law, 74; Andrews *v.* Andrews, *id.*, 141; State *v.* Stewart, 5 Strobh., 29; Chase *v.* Miller, 41 Penn., 403; Brown *v.* Gray, 5 Watts, 17; Canal *v.* Keiser, 7 Harris, 137; McMillan *v.* Graham, 4 Barr, 140; Phila. & Trenton R. R. Co., 6 Whart., 41; Shenango *v.* Wayne Co., 34 Penn., 184; Allen *v.* Commrs., 19 Wend., 342; *Ex p.* Vermilyea, 6 Cow., 555; Low *v.* Galena, 18 Ill., 324; Chicago *v.* Whipple, 22 Ill., 105; Frankfort *v.* Co. Commrs., 40 Maine, 391; Ross *v.* Ellsworth, 49 Maine, 417; De Rochebrune *v.* Southheimer, 12 Minn., 78.)

If the writ were ordered and returned, the evidence upon which the Court of Claims acted would not come under consideration, as the cases above and hereinbefore cited abundantly show. The New York court said:

"We cannot notice that part of the return which relates to the evidence. The testimony is no part of the record in the court below. It is not, therefore, removable either by writ of error or certiorari." (People *v.* Vermilyea, 7 Cow., 137; Nichols *v.* Williams, 8 Cow., 16.)

The testimony is no part of the record, (8 Cow., 16, top, and cases *passim*,) and to the record alone the court is confined when that is brought up by the issuing of the writ. (People *v.* Wheeler, 21 N. Y., 82; People *v.* Mayor, 2 Hill, 9; Borough *v.* Quakertown, 3 Grant's Cas., 203; Morewood *v.* Hollister, 2 Selden, 309; People *v.* Frederics, 48 Barb., 173; Miller *v.* Bush, 21 Wend., 651; Commrs. *v.* Supervisors, 27 Ill., 140; Frederic *v.* Clark, 5 Wisc., 191; Redmond *v.* Anderson, 18 Ark., 449; Miller *v.* McCullough, 21 Ark., 426.)

Nor would any inspection of the testimony suffice. In any case it probably would not make precisely the same impression on any two minds; and it is that which it makes on the court that is by law to grant or refuse the new trial that must prevail. The judges composing that court may have been influenced by different reasons, as is frequently the case. (See Hannum *v.* Belchertown, 19 Pick., 313, cited and approved in Walker *v.* Bailey, 65 Maine, 357.)

VII.

As the writ only brings up the record, (Commrs. *v.* Supervisors, 27 Ill., 143, and cases *passim*,) the *petitioner* cannot adduce any extrinsic evidence to support his petition, since it would be useless to bring it up by evidence that could not affect the final action upon it; but,

on the other hand, the respondent can introduce testimony in order to show that it ought not to issue, even if some technical defect were found to exist in the proceedings of record. It is thus stated in Colby's Practice, 351: "In determining this question [of its issue] in the first instance and before an order of notice is issued, the court usually make a critical examination of the petition, and if there be no substantial error in the proceedings will refuse to grant it. And, *a fortiori*, they will not grant the writ, after a hearing, for mere defects of form; or where, if the proceedings are quashed, very mischievous or ruinous consequences would ensue, and substantial justice has been done." * * * * "For the purpose of determining whether justice requires that such a writ should issue, it is obviously necessary that the examination of the court should not be confined to the record before them. The proceedings of the tribunals against which the writ is usually prayed for are often defective in form, and substance even, where, nevertheless, substantial justice has been done; and a *respondent* may introduce evidence to show it extrinsic to the record." (Colby's Prac., 351, 352, and cases cited; Rutland *v.* Co. Commrs. of Worcester Co., 20 Pick., 77, 78; West River Bridge Co. *v.* Dix, 16 Vt., 449; People *v.* Supervisors, 1 Hill, 197; People *v.* Judge, 2 Hill, 400; Walbridge *v.* Walbridge, 46 Vt., 617.)

Taking into consideration the evidence originally presented and comparing with it the affidavits by which the motion for a new trial was sustained, and the propriety of granting the motion is apparent. If a comparison is made of these affidavits with the book filed before the Mixed Commission, the only matter of which it is claimed the Government attorney had notice at the first trial, it

will be seen that the testimony was new as well as cumulative. In any view, the new trial is to bring into the record questions of the gravest importance, upon which all the facts that have a bearing ought to be fully presented.

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